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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 159.

THE OREGON RAILROAD AND NAVIGATION COMPANY, a corporation,
Appellant,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, OSWALD WEST and A. M. CRAWFORD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR APPELLANT.

W. W. COTTON,
MAXWELL EVARTS,
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Statement.

The appellant is a railroad corporation, doing business within the States of Oregon, Washington and Idaho (Record, p. 2). Defendant A. M.

Crawford is Attorney-General of the State of Oregon, and defendants Campbell, Aitchison and West constitute the Railroad Commission of the State of Oregon, acting as such under an act of the legislative assembly of the State of Oregon adopted in 1907, copy of which is Exhibit "A" to the bill (Record, page 111).

On April 22, 1908, the Railroad Commission, in a proceeding by the Portland Chamber of Commerce against the appellant, found and declared that the class rates then in effect under appellant's freight tariff No. L-525, I. C. C. 1146, between Portland and all points within the State of Oregon east of The Dalles, were unjust and unreasonably high, and prescribed certain lower rates to be charged by appellant in lieu of the class rates fixed by Tariff L-525. Before the effective date of the order appellant filed its bill in the Circuit Court. By this bill the appellant sought to obtain an injunction restraining the enforcement of the order and the establishment of the rates named therein upon various grounds, and particularly upon the ground that the order and the rates named therein would have the effect of regulating interstate commerce and the course of transportation thereof (Record, pp. 2–30).

The defendants demurred to the bill on the grounds, that the court had no jurisdiction of the subject-matter of the controversy and that the bill did not state such a case as to entitle the appellant to the relief sought (Record, p. 25). The defendants also filed demurrers to separate portions of the bill (Record, p. 36). The Circuit Court held that the court had jurisdiction of the subject-matter of the controversy but that the bill did not entitle the appellant to the relief sought (Opinion, Record, p. 39; 173 Fed., 957). Afterward, the appellant by leave of court filed an amendment to the bill (Record, pp. 77–80), and to this amendment and to the bill as amended the defendants again demurred on the same grounds (Record, pp. 81–85). A hearing was had upon the demurrers to the bill as amended; the demurrers were sustained, and the amended bill was dismissed (Opinion, Record, p. 86; 177 Fed., 318). The restraining order theretofore issued was vacated and annulled (Record, p. 89).

The manner in which the order of the Commission affects and regulates interstate commerce is alleged in paragraphs VII to XXIV, inclusive (Record, pp. 5–19) of the original bill, and by the amendment (Record, p. 71). The

facts alleged will be stated substantially in the language of the bill and of the amendment.

The appellant, The Oregon Railroad and Navigation Company, is a corporation organized under the laws of the State of Oregon, and owns a line of railroad in the States of Oregon, Washington and Idaho extending from Portland, Oregon, to Huntington, Oregon, and from Umatilla, Oregon, and Pendleton, Oregon, to Spokane, Washington, and Wallace, Idaho, together with various branch lines of railroad in said States. The principal business of the appellant consists of interstate commerce, and its carrying of such commerce is subject to the sole and exclusive control of Congress. Of the total business of the appellant less than twenty per cent is local within the State of Oregon (Bill, par. I., Record, p. 2). At Huntington, Oregon, the line of railroad of the appellant connects with the line of railroad owned and operated by the Oregon Short Line Railroad Company, extending from Huntington to Granger, Wyoming, and there connecting with the line of the Union Pacific Railroad Company. The line of the Union Pacific Railroad Company extends to Council Bluffs, Iowa, and there connects with various lines of railroad extending to all points

and places in the United States east of the Missouri River (Bill, par. VII., Record, p. 5). The Northern Pacific Railway Company owns and operates a line of railroad from Portland, Oregon, to St. Paul, Minnesota, where said line has a physical connection with various lines of railroad extending to Chicago, Illinois, and other points east of Missouri River. The Northern Pacific Railway Company and its connections are engaged as common carriers in the transportation of large quantities of freight from such eastern points to Portland, and from Portland to such eastern points (Bill, par. XXIII, Record, p. 16). The Southern Pacific Company is engaged in operating a line of railroad extending from San Francisco, California, to Portland, Oregon, and there having physical connection with the railroad of the appellant (Bill, par. XIII, Record, p. 8). The San Francisco and Portland Steamship Company is a corporation operating a line of steamships upon the Pacific Ocean engaged in the transportation of freight between San Francisco and Portland, and said steamship company and appellant constitute a through route, under a common management and control, and make through rates, from San Francisco to

points on appellant's lines east of The Dalles (Bill, par. XII, Record, p. 8).

Effective January 1, 1907, the appellant duly published and filed with the Interstate Commerce Commission and with the Railroad Commission of Oregon, a freight tariff naming class and commodity rates based upon the Western Classification between Portland, East Portland, Albina and St. Johns, and all points and stations on the line of the appellant in Oregon, Washton and Idaho. Said tariff was numbered as follows: No. L-525, O. R. C., No. 39, I. C. C., 1146, and will hereafter for convenience be referred to as L-525. A copy of said tariff marked Exhibit "H" is attached to and made a part of the bill, together with various supplements which from time to time, have been duly published and filed with the Interstate Commerce Commission and with the Railroad Commission of the State of Oregon. From the time of said publication and filing of said rates, said rates were the only rates which the appellant was authorized to charge for the transportation of freight described in said tariff between Portland, East Portland, Albina and St. Johns and various points in Oregon, Washington and Idaho east of The Dalles, Oregon, and were reasonable rates (Bill par. XI, Record, p. 7).

The Western Classification is attached to the bill of complaint and made a part thereof, marked Exhibit "M" (Record, p. 16), and a portion of said classification is printed in the Record commencing at page 217. By reference to the index to this classification (Record, page 222), it will be seen that the classification relates to every recognized article of commerce, and that to each of these articles, in carloads or less than carloads, is assigned one of the ten classes of rates established by the Western Classification and in use upon the lines of the appellant, and the various connecting lines whose names appear in the classification commencing on page 218 of the Record. An inspection of this classification shows that few of the articles mentioned in the classification are produced in the State of Oregon, and paragraph XV of the Bill (Record, p. 10) alleges as follows:

> "At least seventy per cent. of the freight carried, and which will hereafter be carried from Portland to points on your orator's lines in Oregon east of The Dalles, under the class rates established and fixed by tariff No. L-525, originates, and will originate, at points along, or east of, the

Missouri River, or in California, and was and will be first transported from said eastern points, or from California, to Portland, before it is, or will be, transported from Portland, under the class rates established by tariff No. L-525, or under the class rates undertaken to be established by said pretended order of the said Railroad Commission of Oregon, and large quantities of like kind of freight are transported directly from the east to points in Oregon, east of The Dalles, by your orator and the lines connecting therewith, at and under the rates fixed by Union Pacific tariff I. C. C. No. 1578, and are transported from points in California to points in Oregon east of The Dalles by your orator and the San Francisco & Portland Steamship Company, and by your orator and the Southern Pacific Company, at the rates fixed and established by the tariffs in force from California to points east of The Dalles, as hereinbefore alleged."

The amendment to the Bill of Complaint (Record, p. 77) alleges that at least forty per cent of the freight carried under the class rates established by the tariff, L-525, "will be shipped from Portland to points on your orator's line east of The Dalles in the same packages in which it was originally shipped from the point of origin

outside of the State of Oregon to Portland without coming to rest within the State of Oregon and without becoming a part of the traffic of the State of Oregon"; and that at least twenty per cent. of the freight so carried "has been and will be shipped from Portland to points on your orator's lines in Oregon east of The Dalles by carriers and persons bringing the same to Portland from points without the State of Oregon with the intention of immediately and without delay shipping the same over the lines of your orator from Portland to points in Oregon east of The Dalles."

Section 6 of the Act to Regulate Commerce, as amended (34 Stats. at Large, p. 586) requires that every common carrier, subject to the provisions of the act, shall file with the Interstate Commerce Commission all rates for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, when through route and joint rates have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates applied to the through

transportation. The charging of any greater, or less, or different compensation than the rates specified in the tariff is made a misdemeanor. The same section provides that no change shall be made in the rates filed and published by any common carrier, in compliance with this section, except after thirty days' notice to the Commission and to the public, plainly stating the changes proposed to be made.

As a result of the filing of tariff L-525 with the Interstate Commerce Commission and making it applicable to interstate commerce, Section 6 of the Interstate Commerce Act above referred to made the rates so established the only lawful rates which the appellant could charge with respect to interstate commerce moving between Portland and any point on the lines of the appellant in Oregon, Washington or Idaho, unless such commerce moved under some lawfully established through rate, and such rates could not be changed by the appellant without giving thirty days' notice, and by the publishing and filing of a new tariff.

The Railroad Commission by its order (Record, p. 183) finds:

"That the class rates now in effect under

defendant's freight tariff effective January 1, No. L-525, O. R. C., No. 39, I. C. C. No. 1146, with supplements amendatory thereof, over and on said defendant company's main, branch, leased and otherwise controlled railroad lines within the State of Oregon, between the city of Portland and all points within said State on said lines of railroad east of the city of The Dalles in said State, are unjust and unreasonably high. Said tariff is based on existing Western Classification. That the defendant has established class rates between Portland and branch line points which generally are the same or lower for equal distance on the main line.

"That between the city of Portland, Oregon, and all points east of The Dalles, except where, under said tariff, the rates are now the same or less than are prescribed herein, the first class rates now in effect under said tariff should be reduced by an amount equal to one-sixth of the difference between twenty-five cents (the existing first-class rate to The Dalles), and the existing first-class rate to such point; and that all other class rates between Portland and points east of The Dalles, with the exception above noted, should be reduced and bear the same relation to the

first-class rate as is provided in the distance tariff of said defendant company, to wit:

Classes.	1	2	3	4	5	A	B	C	D	E
Per cent of first-class:	100	85	70	60	50	50	40	30	25	20

The rates on branch lines to be the same as on the main line for equal mileage. And that such rates are hereby determined to be just and reasonable rates for the transportation of the property and commodities covered by said tariff under said classes; and that present rates between Portland and any point in the State of Oregon under said tariff should not be exceeded on any class."

As a result of these findings the Commission ordered (Record, p. 183):

"The Oregon Railroad and Navigation Company shall cease and desist from charging any higher rates within this State for the transportation of merchandise and other commodities between the city of Portland and points on the defendant company's main, branch, leased or otherwise controlled railroad lines within the State of Oregon covered by the class rates in said tariff No. L-525, O. R. C. No. 39, I. C. C. No. 1146, than the class rates prescribed in this order, and that said railroad company, in lieu of the rates

herein ordered discontinued, shall substitute the following maximum rates:

"Reduce first class rates (under present Western Classification) between Portland and all points east of The Dalles (except where, under the existing tariff, the rates are now less than prescribed herein) by an amount equal to one-sixth of the difference between twenty-five cents (the existing first class rate to The Dalles) and the existing first class rate to such point, and reduce all other class rates between Portland and points east of The Dalles, with the exception above noted, so that they will bear the same relation to the first class rate as is provided in the distance tariff of said defendant railroad company, to wit:

	1	2	3	4	5	A	B	C	D	E
Per cent of first class:	100	85	70	60	50	50	40	30	25	20

The defendant shall apply such rates to the supplements to and reissues of the present Western Classification.

"It is further ordered, considered and determined that the rates under the existing tariff shall not be exceeded on any class between any points covered by said tariff nor apply to or change any rate now in effect that is lower than the rates prescribed by this order; provided, the rates

herein ordered may equal the present rates between Portland and The Dalles when the application of the formula herein prescribed would reduce the rates below the said present rates between Portland and The Dalles.

"When the application of the formula produces a remainder of one half cent or greater fraction the company shall be entitled to charge the whole cent and when less than one half cent the same shall be dropped."

The appellant insists that the order of the Commission is a direct prohibition against the application by the appellant of the rates established by tariff L-525 to the interstate commerce which formerly moved under such tariff, and that therefore the order of the Commission is a regulation of interstate commerce.

When this question was presented to the court below the view was taken that the order should be construed as applicable only to intrastate commerce, and that any questions as to whether any particular shipment or any particular commodity was intrastate commerce could be determined in the special cases as they arose, and that "it is impossible by a general decree to determine in advance what specific commodities and the

transportation thereof constitute interstate and what intrastate commerce" (Record, p. 88). This part of the opinion clearly ignores the allegation of the amendment to the Bill to the effect that at least forty per cent. of the traffic moving under tariff L-525 was interstate commerce.

Immediately upon the dismissal of the bill claims were presented against the bond given by the appellant at the time of obtaining the restraining order, and three of these claims were presented to the court by the petition in intervention of W. S. Smallwood (Record, page 90). The court held (Record, p. 96; 180 Fed., 253) that all traffic shipped locally between Portland and points in eastern Oregon was, from a rate standpoint, intrastate commerce, notwithstanding the fact that such traffic in the hands of the owner might be interstate commerce for every other purpose. Upon this point the court said (Record, p. 99).

> "Transportation from a point in one State to a point in another is undoubtedly interstate commerce. But, says the court in *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S., 403, 409:
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> "'When the commodity transported has reached the termination of its journey and

has been delivered to the consignee, it ceases to be a subject of interstate commerce, and the subsequent shipment from the point at which it has been delivered to another point in the State, is an intrastate shipment.'

"The case turns upon the contract of shipment between the shipper and carrier, and when that is at an end, the shipper can claim nothing further as it respects the property carried. It is then at the command of the owner, and if he chooses to ship it again from one point to another in the State, it becomes an intrastate shipment, notwithstanding the owner may be dealing with an article of interstate commerce. For illustration, take the case of *Leisy v. Hardin*, *supra*; where beer was shipped into Iowa in original packages, the owner could not be deprived of the right to sell the beer, while it remained in original packages because it was an article of interstate commerce. The shipment of the beer to him from another State was an interstate shipment. When that shipment was at an end, another carrier, who might transport the beer to another point in the State of Iowa, could not claim that the shipment was interstate because the article might be characterized interstate commerce in the hands of the owner. There must be, and is, a distinction between interstate com-

merce as it pertains to the article and interstate commerce as it pertains to transportation and carriage. The former depends upon the fact that it is an article of commerce, that is, of barter and sale, between the States or with foreign countries, and the latter upon the fact that it is being transported from one State into another. When the transportation ceases or comes to an end, the shipment has lost its character as an interstate shipment, and if the commodity is again moved it becomes an intrastate or interstate shipment according as it is moved to a point wholly within the State or a point without."

In connection with the above statement of the court attention is called to the fact that the quotation made apparently from the opinion of this Court is taken from the reporter's abstract of the brief filed by the Attorney General of the State of Texas and found, as indicated, on page 409 of the report.

The bill alleges and shows that no matter what may be the character of commerce moving between Portland and points in eastern Oregon, the rates between Portland and points in eastern Oregon are so related to rates upon commerce moving into eastern Oregon from California

and points east of Missouri River that any regulation of the rates between Portland and eastern Oregon points directly regulates the rates on such interstate commerce and the course of transportation thereof.

Upon this proposition the Circuit Court, as the result of all the opinions rendered, held:

First, that the State has sole, exclusive and supreme power to regulate the rates upon intrastate commerce;

Second, that all commerce shipped locally on appellant's line between Portland and points in eastern Oregon is, for the purpose of rate regulation, intrastate commerce, and therefore subject to the sole, absolute and supreme power of the State;

Third, that if regulation by the State of the rates on traffic shipped locally between Portland and points in eastern Oregon has any effect upon interstate rates, or the movement of commerce between the States, or the transportation of such commerce, such effect cannot be allowed to interfere in any way whatsoever with the supreme power of the State to regulate the rates upon such commerce.

The court says in its first opinion (Record, p. 69):

> "So, if it be that the local State rates, as fixed and regulated by the State Railroad Commission on these commodities, unsettle in some way previously fixed transcontinental or interstate rates, that circumstance does not render the State rates invalid as an interference with interstate commerce."

Under the decisions of this Court the State of Oregon cannot, by any attempted regulation of intrastate commerce, burden interstate commerce, regulate the rates thereon, or change the course of transportation thereof. The decisive question, therefore, is,—does the order of the Commission substantially burden, affect or regulate interstate commerce?

In order to determine this question the adjustment of rates in the northwest must be considered, and the facts regarding this adjustment are alleged in the bill.

By section 6 of the Act to Regulate Commerce, and the amendments thereto (34 Stats. at Large, 586), if no joint rate over any through route has been established the several carriers in such through route shall file, print and keep open to public inspection the separately established rates, fares and charges applied to the through transportation. By filing tariff L-525 with the

Interstate Commerce Commission the appellant made the rates therein named between Portland and points in eastern Oregon applicable to interstate commerce and subject to be used by any carrier connecting with the line of the appellant at Portland, in naming rates from points without the State of Oregon to points in eastern Oregon (*In re Through Routes and Through Rates*, 13 I. C. R., 163). Thus, for example, a shipment originating on the Northern Pacific in the western part of Washington, moving on through-billing to a point in eastern Oregon, would take the duly established rate of the Northern Pacific to Portland plus the rate of the appellant from Portland to eastern Oregon shown by tariff L-525. Under the Interstate Commerce Act and the rulings of the Interstate Commerce Commission thereunder, the above combination would be the only lawful rate which could be charged upon such shipment.

The appellant and its various connecting carriers published a tariff, in which a large number of railroad companies concurred, naming class and commodity rates from New York and common points, from Philadelphia and common points, from Cincinnati and common points, from Chicago and common points, from Missis-

sippi River common points and from Missouri River common points to certain north Pacific coast terminals, including Portland, Oregon, and duly filed said tariff with the Interstate Commerce Commission. Said tariff names rates to no point or place on the lines of the appellant east of Montavilla, Oregon. This tariff, for convenience, will be referred to hereafter as the Transcontinental Terminal Tariff (Bill, par. IX, Record p. 6). The Northern Pacific Railway Company, operating between Portland and all points east, is a party to the Transcontinental Terminal Tariff, and, as a result, makes the same rates from any eastern point to Portland as the rates made by appellant and its connections (Bill, par. XXIII, Record p. 16).

The appellant and its connections and the Northern Pacific Railway Company and its connections, published and filed with the Interstate Commerce Commission a tariff on wool, designated in the bill as Exhibit "J" being I. C. C. No. 812, from Portland to Boston, Philadelphia and New York, establishing a rate of $1.00 per cwt. (Bill, par. XXIV, Record, p. 17).

The rates fixed and established by the Transcontinental Terminal Tariff and by the wool Tariff I. C. C. No. 812 are very low, and

are less than reasonable rates for the service performed, and are made so low solely because of the fact that freight covered by said tariffs is, and can be, transported from New York and other eastern points to Portland, by carriers operating vessels on the ocean (Bill, pars. XXIII and XXIV, Record, pp. 16 and 17).

The appellant and its connections published a tariff and filed the same with the Interstate Commerce Commission covering the transportation of freight between Chicago and various eastern points, and various stations in Oregon on the lines of the appellant east of The Dalles. This tariff is attached to the bill and marked Exhibit "B," and will hereafter be referred to as Union Pacific Tariff I. C. C. No. 1578 (Bill, par. VIII, Record, p. 6). As the result of water competition the rates fixed by Union Pacific Tariff I. C. C. No. 1578 to eastern Oregon points are higher than the rates to Portland. In order to avoid the unjust discrimination possibly occurring through the fixing of rates by Union Pacific Tariff I. C. C. No. 1578 higher than the combination of the Transcontinental Terminal Tariff rate and the local back from Portland to destination, it is provided in Union Pacific Tariff I. C. C. No. 1578 that

where the Transcontinental Terminal Tariff rate to Portland added to the local rate from Portland to any point in eastern Oregon established by tariff L–525, is a lower rate to the same point than is shown by Union Pacific Tariff I. C. C. No. 1578, then the combination of the Transcontinental Terminal Tariff rate and the rate fixed by tariff L–525 shall govern. (Bill, par. XV, Record, p. 10.)

The appellant, in connection with the Oregon Short Line Railroad Company and the Union Pacific Railroad Company, and the various lines connected therewith, duly published and filed with the Interstate Commerce Commission a tariff on wool from various points on the line of the appellant east of The Dalles to Boston, Philadelphia, New York and other eastern points. This tariff is designated in the bill as Exhibit "K", and bears number I. C. C. No. 1177. The wool tariffs mentioned herein are based upon the Western Classification, and wool under the Western Classification takes the third class rate. The wool rates established by Exhibit "K" are equal to, or less, than the combination of the third class rate fixed and established by tariff L–525 from eastern Oregon points to Portland, and the rate of

$1.00 established from Portland to Boston, Philadelphia and New York by Exhibit "J". (Bill, par. XXIV, Record, p. 17.)

In connection with the San Francisco and Portland Steamship Company, and in connection with the Southern Pacific Company, the appellant has established through rates from San Francisco to various points in eastern Oregon, and such rates consist mainly of a combination of the rates fixed by tariff L-525 from Portland and certain arbitraries or local rates, and such rates so established are filed with the Interstate Commerce Commission and are reasonable rates (Bill, pars. XII and XIII, Record, p. 8).

Under the decision of the court below any person having freight originating at any point or place outside of Oregon could have offered the same at Portland for transportation to an eastern Oregon point, and the appellant would have been compelled to receive such freight and transport it to destination at the rates fixed by the Commission order. Obedience, therefore, to the order of the Commission produced the following results directly affecting the interstate commerce, the rates thereon and the course of transportation thereof :

(1) A lower scale of class rates was established between Portland and points in eastern Oregon than appellant had established under tariff L-525 between Portland and Washington points, or than appellant could establish for a period of thirty days to or from Washington points without the permission of the Interstate Commerce Commission;

(2) A combination of the Commission order rates and the rates of the Northern Pacific Railway Company to Portland from western Washington points was less in all instances than the combination of the same rates of the Northern Pacific Railway Company and the rates established by tariff L-525;

(3) The combination of the Transcontinental Terminal Tariff rates to Portland and the Commission order rates to all eastern Oregon points was less than the direct rates established by Union Pacific Tariff I. C. C. No. 1578. This is alleged and illustrated in paragraph XVI of the Bill (Record, p. 11);

(4) The combination of the local rates from San Francisco to Portland and the Commission order rates from Portland to eastern Oregon points, is less than the direct through rates from San Francisco to eastern Oregon points estab-

lished by the tariffs mentioned in paragraphs XII and XIII of the Bill (Record, p. 8). This is alleged and illustrated in paragraph XVII of the Bill (Record, p. 11);

(5) The combination of the rates on wool from Portland established by Exhibit "J" and the Commission order rates from eastern Oregon points to Portland was less than the rates from eastern Oregon points to eastern destination established by Exhibit "K." This is alleged and illustrated in paragraph XXIV of the Bill (Record, p. 19).

Each of the foregoing matters constitutes an unjust discrimination against interstate commerce shipped directly from the point of origin to the point of destination, and such unjust discrimination could be corrected, if the Commission order is allowed to stand, only by a change in the interstate rates of the appellant and its connections, and if such unjust discrimination was not corrected by a change in rates then the discrimination would stop the direct transportation of interstate commerce between points of origin and eastern Oregon points and force such commerce to be first transported to Portland and then reshipped locally from Portland to destination.

Assignment of Errors.

1. That the court below erred in sustaining the joint and several demurrers of the defendants to the appellant's original bill of complaint;

2. That the court below erred in sustaining the joint and several demurrers of the defendants to the amendment to the bill of complaint;

3. That the court below erred in sustaining the joint and several demurrers of the defendants to the amended bill of complaint of the appellants;

4. That the court below erred in holding and deciding that the order of the Railroad Commission of Oregon, establishing the rates sought to be enjoined, was not a regulation of interstate commerce, and was not a violation nor in contravention of the provision of the Constitution of the United States to the effect that Congress shall have power to regulate commerce with foreign nations and among the several states.

ARGUMENT.

I.

Any attempted regulation by the State of intrastate transportation rates which necessarily affects and regulates rates upon interstate traffic or the movement of such traffic, is an unconstitutional interference with interstate commerce.

Eliminating for the moment any question of the character of commerce shipped locally between Portland and points in eastern Oregon, the appellant insists that the power of the State is not supreme and absolute over such commerce and the rates for its transportation and that any and all power which the State exercises over such commerce and rates therefor, must be exercised in subordination to the supreme and absolute power of the National Government to regulate commerce between the States and that no action can be taken by the State with respect to such commerce or the rates applicable thereto which will in any way directly affect the rates upon interstate commerce or the course of traffic or the manner of transportation thereof.

The power of Congress to regulate interstate commerce is supreme and exclusive. If the power of Congress to regulate commerce cannot

be effectually exercised without affecting intrastate commerce, then Congress may regulate intrastate commerce so far as necessary in order to regulate interstate commerce fully and effectually, and if the power of the Federal Government to regulate interstate commerce and the attempted exercise by a State of its power to regulate intrastate commerce conflict, the former must prevail and the latter must give way because the constitution and the acts passed in pursuance thereof are the supreme law of the land.

Southern Railway Co. vs. The United States, 222 U. S., 20.
Southern Railway Co. vs. Reid (Decided by this Court Jan. 9, 1912).
Mondou vs. New York, New Haven & Hartford Railroad Co. (Decided by this Court Jan. 15, 1912).
Western Union Telegraph Co. vs. Kansas, 216 U. S., 1.
West vs. Kansas Natural Gas Co., 221 U. S., 229.

In *Western Union Telegraph Co. vs. Kansas*, 216 U. S., 1, Mr. Justice HARLAN says, at p. 37:

> " We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business

which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the supreme law of the land."

In *West vs. Kansas Natural Gas Company*, 221 U. S., 229, Mr. Justice McKENNA says, at page 260:

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a State, and that it cannot be regulated or restrained by a State, or that a State cannot exclude from its limits a corporation engaged in such commerce. To attain these un-

authorized ends is the purpose of the Oklahoma statute. The State, through the statute, seeks in every way to accomplish these ends, and all the powers that a State is conceived to possess are exerted and all the limitations upon such powers are attempted to be circumvented. Corporate persons are more subject to control than natural persons. The business is therefore confined to the former, and foreign corporations are excluded from the State. Lest they might enter by the superior power of the Constitution of the United States, the use of the highways is forbidden to them and the right of eminent domain is withheld from them, and the prohibitive strength which these provisions are supposed to carry is exhibited in the fact that the boundary of the State is a highway. * * *

"The inaction of Congress is a declaration of freedom from State interference with the transportation of articles of legitimate interstate commerce. * * *

"'No State by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on.'"

The State in attempting to regulate rates on intrastate traffic can take no action which will

directly regulate rates upon interstate traffic or affect the movement of such traffic.

Wabash, &c., Ry. Co. vs. Illinois, 118 U. S., 557.
Louisville & Nashville Ry. Co. vs. Eubank, 184 U. S., 27.

In *Wabash, &c., Ry. Co. vs. Illinois*, 118 U. S., 557, Mr. Justice MILLER, after a review of the authorities, says (p. 575):

> "We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

In *Louisville and Nashville Ry. Co. vs. Eubank*, 184 U. S., 27, the railroad company made a charge of 12 cents per 100 pounds for the transportation of tobacco from Nashville, Tennesssee to Louisville, Kentucky. The railroad company alleged that this rate was extremely low, made necessary in order to enable the company to meet competition of boats plying between Nashville and Louisville. From Frank-

lin, Kentucky, a place intermediate between Nashville and Louisville, the company transported tobacco to Louisville, at the rate of 25 cents per 100 pounds. At the time these rates existed Section 216 of the Constitution of Kentucky prohibited the charging of a greater rate for a shorter than a longer distance over the same line in the same direction. The Supreme Court of Kentucky held that this constitutional provision was violated by the rate adjustment referred to. This Court held that the constitutional provision as construed was void. In disposing of the question involved, Mr. Justice PECKHAM, page 40, said:

> " Is it an answer to this statement to say that the company can get this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the State? If it be, is not the law which accomplishes this result a direct interference by the State with interstate commerce? And if it do not lower its State rates and in consequence must raise its interstate rates, in order to make its State rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law

from which such necessary and direct consequences result a regulation in effect by the State, of that commerce which ought to be free therefrom?"

On page 41 it is said:

"The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed, where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent, the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.

* * * * *

"It seems also to be thought that there is no regulation of commerce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or

route, or by any other individual or corporation than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its direct result regulates the interstate transportation of a single individual carrier, or a company of carriers, violates the provision in question; that it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the State legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company."

II.

Interstate commerce, reshipped in original packages, moved between Portland and points in eastern Oregon under tariff No. L-525, and the order of the Commission prohibits the application of said tariff thereto.

In paragraph XV (Record, p. 10) it is alleged that at least seventy per cent. of the freight carried from Portland to points in Oregon east of The Dalles under the class rates established

and fixed by tariff L-525 originates and will originate at points along or east of Missouri River or in California. The amendment (Record, p. 77) alleges that at least forty per cent. of such freight is shipped out of Portland in original packages and without coming to rest within the State of Oregon and without becoming part of the traffic of the State of Oregon, and at least twenty per cent. is shipped from Portland to points in Oregon east of The Dalles by carriers and persons bringing the same to Portland from points without the State of Oregon with the intention of immediately and without delay shipping the same over the lines of the appellant to destination. The order of the Commission prohibits the charging of the rates fixed by tariff L-525 upon any of such traffic. Is any of such traffic interstate commerce?

Constrained apparently by the case of *Gulf, Colorado and Santa Fe Railroad Company vs. Texas*, 204 U. S., 403, the court held that while such traffic might be the subject of interstate commerce and therefore free from any State prohibition against sale or movement, nevertheless, from a transportation standpoint, it was intrastate commerce and subject to rate regulation by the State (Record, p. 99).

The appellant concedes that after rates are put into effect between Portland and points in eastern Oregon the shipper of any kind of merchandise is entitled to avail himself of such rates and have his commerce transported to Portland and there reshipped to an Oregon destination under such rates, but the appellant insists that while the reshipment would be intrastate the commerce, if actually moving from a point without the State of Oregon, would be interstate commerce and that, therefore, the appellant has a right to resist putting into effect rates between Portland and points in Oregon applicable to such commerce, and thus prevent shippers from availing themselves of State made rates in the movement of interstate commerce.

In *Gulf, Colorado and Santa Fe Railroad Company vs. Texas*, 204 U. S., 403, the rates were already established and the railroad company was undertaking to resist application of the rates to a movement to which the rates in terms applied. The sole and only question, therefore, involved in that case was, whether the shipment was one to which the rates did apply, and nowhere throughout the opinion is the expression "intrastate commerce" used. The power of the

State of Texas to establish such rates was not challenged.

Traffic which commences to move in one State to a destination in another State is interstate commerce and continues to be interstate commerce until after the importation is completed and the property imported has mingled with, and become a part of, the general property of the State. Therefore, goods from another State may be sold in original packages, free from any interference of any kind whatsoever on the part of the State in which such goods are attempted to be sold.

Leisy vs. Harden, 135 U. S., 100.
Lyng vs. Michigan, 135 U. S., 161.
Caldwell vs. N. Carolina, 187 U. S., 622.
Schollenberger vs. Pennsylvania, 171 U. S., 1.
May vs. New Orleans, 178 U. S., 496.
Austen vs. Tennessee, 179 U. S., 343.
Cook vs. Marshall County, 196 U. S., 261.
Vance vs. Vandercook Co., 170 U. S., 438.

Under these authorities traffic originating outside of the State of Oregon is interstate commerce until the goods are sold within the State

of Oregon and become mingled with the general mass of property in the State. Any attempt on the part of the State or any person presuming to act under State authority, to interfere with such interstate traffic, either by taxing it, or by preventing its sale, or by hindering its transportation, or by regulating the rates for the transportation thereof, is a regulation of interstate commerce.

"The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe vs. Errol*, 116 U. S., 517, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be in *Brown vs. Houston*, 114 U. S., 622, the point of time at which it arrives at its destination" (Mr. Justice McKenna, in *General Oil Co. vs. Crain*, 209 U. S., 228).

Through-shipment and through-carriage by a single carrier or by affiliated carriers are not necessary to interstate commerce. The essential thing is the movement.

A herd of sheep driven at a reasonable speed from a point in Utah across the State of Wyoming, a distance of five hundred miles, to a point in Nebraska for the purpose of shipment by rail

from the latter point, is held to be property engaged in interstate commerce so as to be exempt from taxation in the State of Wyoming under a statute taxing all live stock brought into the State for the purpose of being grazed.

Kelley vs. Rhoads, 188 U. S., 1.

In *Kelly vs. Rhodes* the time consumed in driving the sheep from the western boundary of the State of Wyoming to Pine Bluff station was six to eight weeks. Assume that instead of driving such sheep entirely across the State of Wyoming to Pine Bluff station, the sheep had been loaded upon cars and transported locally within the State for a distance of say fifty miles, and there unloaded and thence moved on foot to Pine Bluff. Certainly the sheep during such movement by rail would have been interstate commerce and the railroad company transporting such sheep would have been engaged in the transportation of interstate commerce.

The appellant as a common carrier engaged in the transportation of the commerce mentioned in the amendment to the bill (Record, p. 77) would undoubtedly be subject to regulation by Congress on the ground that such traffic was interstate traffic. Such regulation would be sustained no matter how disconnected the service

of the appellant might be from any other part of the transportation.

The Daniel Ball, 10 Wall., 557.
U. S. vs. Colo. & N. W. R. R. Co.,
157 Fed. Rep., 321.

The Daniel Ball, a steamboat, was navigating the Grand River in the State of Michigan without a license, and the United States brought a suit for the penalty. The owner of the vessel answered that the steamer was employed solely in intrastate commerce. The parties to the suit stipulated that the vessel operated entirely in Michigan between Grand Rapids and Grand Haven; that she did not run in connection with or in continuation of any line of steamers or vessels on the lake, or any line of railway in the State; that she was a common carrier between the two cities named and that some of the goods carried between the two places were destined and marked for places in States other than Michigan and that some of the goods which she received at Grand Haven came from other States and were destined for places within the State of Michigan. Upon the matters pertinent to the question in this case, this Court said (p. 565):

> "In this case it is admitted that the steamer was engaged in shipping and trans-

porting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the trans-

action. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

" It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State, on which grain or fruit is transported to a distant market.

" We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at

> the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

In *U. S. vs. Colorado & N. W. R. R. Co.*, 157 Fed. Rep., 321, it was held that the Safety Appliance Act of Congress applied to a narrow-gauge railroad operating within the State of Colorado, said company not being engaged in interstate transportation in connection with any other railroad. The case, in the language of SANBORN, Circuit Judge, presented but the following question (p. 323):

> " Is a common carrier which operates a railroad entirely within a single State, and transports thereon articles of commerce, shipped in continuous passage from places without the State to stations on its road, or from stations on its road to points without the State, free from any common control, management or arrangement with another carrier for continuous carriage or shipment thereof, subject to the provisions of the Safety Appliance Act?"

It will be further noted, as shown on page 324 of the opinion, that the railroad company involved rebilled the goods, and had aimed, as far

as possible, to avoid being a carrier engaged in interstate commerce. The court held, however, that the railroad was subject to the Safety Appliance Act, for the reason that the goods so transported, although rebilled by the carriers, were, nevertheless, interstate commerce. Upon this point the court said, page 323:

> "Importation into one State from another is the indispensable element, the test, of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one State to a prescribed destination in another is a transaction of interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one State until their delivery at their destination in the other is completed, and they there mingle with and become a part of the great mass of property within the latter State. Their transportation never ceases to be a transaction of interstate commerce from its inception in one State until the delivery of the goods at their prescribed destinations in the other, and every one who participates in it, who carries the goods through any part of their continuous passage, unavoidably engages in interstate commerce."

If the appellant engaged in transporting such commerce and its cars and equipment hauling the same are subject to regulation by Congress, it would certainly seem that the rates charged by the appellant for the transportation of the same commerce ought to be free from State regulation.

In *Leonard vs. Kansas City Southern Ry. Co. et al.*, 13 I. C. C. Rep., 573, the question involved was whether the Commission could require the belt railway mentioned in the opinion to establish a joint through rate on coal transported from points without the State of Missouri, the belt railway being a line of railway ten miles in length and operating wholly within the State of Missouri. The Commission, speaking through Commissioner Prouty, held that under the Interstate Commerce Act, the Commission had such power. In view of the familiarity of the Interstate Commerce Commission with the practices and the geographical situation of railroads, the following statement made by Commissioner Prouty should be carefully considered in its bearing on this case (p. 586):

> "The case before us concerns a railroad less than 10 miles in length, which performs a very insignificant part in transporta-

tion between the States. It is urged that Congress cannot have intended to lay hold upon this agency of commerce and subject it to the regulation of the Federal Act. But there can be no distinction in principle between the short road and the long one, between the railroad which handles but 100 carloads of interstate freight per year and that which transports thousands daily.

"The New York Central and Hudson River Railroad extends from Buffalo to New York, 440 miles, entirely in the State of New York. Over it flows a vast volume of commerce between points within and without the State. If it be true that the Kansas City and Westport Belt Railway can entirely exempt itself from Federal control with respect to interstate transportation, the same thing must be true of the New York Central. If this railway can decline to receive interstate traffic at Dodson, the New York Central can decline to receive it at Buffalo. If the rates under which the Kansas City and Westport Belt Railway handles interstate business between Dodson and Westport, are not subject to the control of this Commission, then the rates of the New York Central from Buffalo to New York may be withdrawn from our control. If the State of Missouri can determine the

conditions under which freight coming from points without that State shall be carried by this railroad from Dodson to Westport, then the State of New York can determine the terms and conditions upon which traffic received by the New York Central at Buffalo shall be transported to points within the State of New York. To deny the right of Congress to regulate the movement of interstate freight over this 10 miles of railway is virtually to deny its effective power *in toto*."

As clearly indicated by Commissioner Prouty, the main line of the New York Central Railroad Company between New York and Buffalo is located entirely within the State of New York, and yet the New York Central is probably the greatest railroad carrier of interstate commerce in the country.

To assert that the New York Central Railroad or the State of New York can, by requiring or forcing local billing of interstate commerce from Buffalo to New York, change the character of such commerce and prevent Congress or the Interstate Commerce Commission from regulating the same, is to deny *in toto* the effective power of Congress to regulate interstate commerce and the rates thereon.

State legislatures and State railroad commissions have apparently the power to establish depots at any point desired, and therefore the State of Oregon could establish a depot at the Washington State line and the State of Washington on the other side of the State line could establish a like depot. Traffic could, of course, be trucked across the boundary lines and reshipped. If the State of Oregon could regulate the rates from Portland to the State line, and the State of Washington could regulate the rates from the State line to destination, then the transportation of all interstate commerce and the rates to be charged therefor could be regulated and controlled by the States to the exclusion of and contrary to the control thereof by Congress.

In this connection paragraph XXI of the Bill (Record, p. 15) alleges as follows:

> "If the State of Washington should see fit to establish rates in Washington equal to the rates attempted to be established by the said order 'Exhibit I,' the result would be that the interstate rate charged by your orator for the transportation of freight between various points in Oregon and various points in Washington, could not be lawfully or practically greater than the sum of the

respective local rates so attempted to be established by the States of Oregon and Washington, and therefore the said interstate rate would be wholly and necessarily established by the said respective States, to the exclusion of, and contrary to, the sole and exclusive control which should properly be exercised thereover by Congress, under the Constitution of the United States, and by the Interstate Commerce Commission, pursuant to the Act to Regulate Commerce, hereinbefore mentioned."

III.

The Commission order creates an unjust discrimination against interstate traffic destined to eastern Oregon and against wool and other commodities shipped from eastern Oregon to points in eastern States and regulates such interstate commerce by forcing changes in the interstate rates of the appellant or a change in the routing of such traffic.

Assuming but not conceding that all commerce shipped locally between Portland and points in eastern Oregon is intrastate commerce, the State of Oregon nevertheless cannot regulate

the rates upon such traffic so as to burden interstate commerce, or affect the rates thereon, or change the course of transportation thereof. It is well established that the laws of the State or the orders of its Commission relating to intrastate commerce "which by their necessary, natural or probable operation have the effect of substantially burdening interstate commerce, are violative of the commercial clause of the United States Constitution, and void." It is the effect and not the purpose of the State regulations of local commerce which determines whether or not they so substantially burden interstate commerce that they violate the commercial clause of the Constitution.

Both of the foregoing propositions are stated in the opinion in *Western Union Telegraph Company vs. Kansas*, 216 U. S., 1. This Court said therein, at page 27:

> "But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation burdens interstate commerce, it must be

adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

Under all of the authorities the decisive question is—does the order of the Commission substantially burden, affect or regulate interstate commerce?

The facts alleged in the bill relating to the adjustment of rates in the northwest show conclusively that the order of the Commission does regulate interstate commerce.

Before considering the facts alleged in the Bill, it is deemed proper to call the attention of the court to certain provisions of the Act to Regulate Commerce and to the construction placed thereon by the Interstate Commerce Commission.

By Section 3 of the Act to Regulate Commerce, it is made unlawful for any common carrier to make or give undue preference or privilege to any particular locality or traffic of any description whatever, or subject any particular

locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By Section 4 of the Act, it is made unlawful for any common carrier to charge any greater compensation in the aggregate for the transportation of the same kind of property for a longer than a shorter distance over the same route in the same direction, the shorter being included within the longer distance.

By Section 6, it is provided that all charges of interstate carriers shall be published and filed with the Interstate Commerce Commission, and that no change in such rates shall be made, except after thirty days' notice to the Interstate Commerce Commission.

Every haul by a carrier involves two terminal services, one at the point of origin and the other at the point of delivery, and it is therefore clearly an unjust discrimination as a matter of fact for a carrier to charge a greater compensation as to a through rate than an aggregate of two local rates.

In the practical administration of the Act to Regulate Commerce, the Interstate Commerce Commission has several times stated that a through rate that is higher than the combina-

tion of intermediate rates is *prima facie* unreasonable, and by amendment of June 18, 1910 (36 Statutes at Large, 539), it is provided that it shall be unlawful for any common carrier to charge a greater compensation as to a through route than the aggregate of the intermediate rates, subject to the provisions of the act.

In *Martin vs. Southern Pacific Company*, 2 I. C. C. Rep., 1, the Interstate Commerce Commission, in 1888, held:

> "An intermediate local rate should never exceed the through rate to the terminus of the line plus the local rate back to the intermediate point."

Under the decisions of the Interstate Commerce Commission and of the courts it has been held that the competition by sea between the Atlantic Coast and the Pacific Coast States justifies the railroads operating to the Pacific Coast in charging a higher rate from eastern points to a point in the interior of Oregon, Washington or California than is charged to the Pacific Coast terminal.

Farmers' L. & T. Co. vs. N. P. Ry. Co., 83 Fed., 249.

I. C. C. vs. A. T. & S. F. Ry. Co., 50 Fed. Rep., 295.

Colo. Fuel & Iron Co. vs. S. P. Co., 6 I. C. C. Rep., 488.

Kindel vs. A. T. & S. F. Ry. Co., 8 I. C. C. Rep., 608.

Shippers' Union of Phœnix vs. A. T. & S. F. Ry. Co., 9 I. C. C. Rep., 250.

Business Men's League of St. L. vs. A. T. & S. F. Ry. Co., 9 I. C. C. Rep., 318.

Kindel vs. B. & A. R. R. Co., XI. I. C. C. Rep., 495.

Enterprise Mfg. Co. vs. G. R. R. Co., 12 I. C. C. Rep., 130.

Nevada R. R. Com. vs. S. P. Co., 19 I. C. C. Rep., 238.

Harbor City Wholesale Co. of San Pedro vs. S. P. Co., 19 I. C. C. Rep., 323.

No possible justification, however, exists for the charging of a higher rate to the interior point than the rate to the Pacific Coast point plus the local back to the interior point.

Any attempt on the part of the appellant to charge a greater compensation for the through transportation of interstate commerce to eastern Oregon points than the combination of the rates, resulting from a shipment to Portland and re-

shipment to destination, is an unjust discrimination as a matter of fact, and cannot be sustained as a matter of law; and this is true whether the rates from Portland are made by the appellant voluntarily or are made by the State of Oregon.

The Commission order had the effect of making in each of the following cases the through rate from points of origin to destination, although established under and subject to the Interstate Commerce Act, greater than the combination of the existing interstate rate to Portland from point of origin and the Commission order rate between Portland and eastern Oregon points, to wit:

FIRST. Traffic delivered to the appellant at Portland by any connecting carrier from local points as, for example, delivered by the Northern Pacific from local points in Washington, not covered by any through tariff, destined to eastern Oregon points.

SECOND. Traffic from San Francisco carried by the Southern Pacific Company and the appellant, and by the San Francisco and Portland Steamship Company and the appellant, under the through tariffs to which reference has been made, to eastern Oregon points.

THIRD. Traffic from all eastern points destined to eastern Oregon.

FOURTH. Wool from eastern Oregon destined to Boston and other eastern points.

Such unjust discrimination whether made voluntarily by the appellant or by the Oregon Railroad Commission is subject to the jurisdiction of the Interstate Commerce Commission. *In Reliance Textile and Dye Works vs. Southern Railway Co.*, 13 I. C. R., 48, the Commission says (p. 53):

> "The complaint alleges that the defendants, or some of them, who participate in these through rates to Chicago and to the Ohio River have made unduly low local rates from the producing mill to the southern dyeing establishment. That one upon which the complaint seems to dwell more than any other is a rate of 17 cents per 100 pounds from South Carolina mills to Clearwater. Clearwater is situated in the State of South Carolina, although it takes the rate applicable to Georgia points, and since these low rates from the mills to Clearwater are State rates, the defendant insists that we have no jurisdiction of this aspect of the case.
>
> "To this we cannot agree. The same lines participate in all these rates from the

mill to the dye works of the complainant and its competitor, and from these in turn to the points of consumption. When a discrimination, forbidden by the Act to Regulate Commerce, arises from an adjustment of State and interstate rates, carriers subject to our jurisdiction and participating in the interstate rates cannot escape responsibility by claiming that the discrimination is accomplished through a reduction of the State rate so long as that reduction is voluntary. They were answerable for the effect produced by the combination of rates, all of which they control.

"The Southern Railway, for example, names the rate from the producing mill in South Carolina to the works of the complainant at Cincinnati, and it also names the rate from the same mill to the Clearwater works in South Carolina. Its duty is to treat, in the matter of transportation, both these operations with fairness. It can no more shut up the industry of the complainant by unduly reducing the State rate made to its competitor than by unduly advancing the interstate rate which the complainant itself is required to pay.

"This must certainly be so where the State rate is voluntarily made, and we think that the same conclusion must finally be

reached where the State rate is made by State authority. A State can no more improperly prefer an industry within its borders as against an industry located without by the imposition of an improper freight rate than the Southern Railway can unduly prefer that industry in its own interest."

If the Oregon Commission order be allowed to stand, the only way in which such unjust discrimination could be avoided would be by a change of the interstate rates of the appellant to such an extent that the through interstate rates to eastern Oregon points would be less than the locals by way of Portland. Such a change would affect every interstate rate from all points and places to eastern Oregon points. Any such forced change of rates is necessarily a regulation of interstate commerce.

Louisville & Nashville R. R. Co. vs. Eubank, 184 U. S., 27.

If the interstate rates to eastern Oregon points are not changed the continued existence of the lower rates by way of Portland would cause the direct movement of interstate commerce to eastern Oregon points to cease and to be superseded by a movement first to Portland and then reshipment to destination.

The point under consideration may be made more specific by taking the rate on wool, mentioned in Paragraph XXIV of the bill. Such illustrations, however, might be multiplied by referring to nearly every article mentioned in the Western Classification shipped from any eastern point, or from California.

Paragraph XXIV of the bill (Record, pp. 17–19) shows that large quantities of wool are shipped from points in eastern Oregon to Boston, New York and Philadelphia under tariffs duly published and filed with the Interstate Commerce Commission. The rates so established by the applicable interstate tariff, Exhibit "K," I. C. C. No. 1177, are equal to or less than a combination of the third class rate fixed and established by tariff L–525 from eastern Oregon points to Portland and the transcontinental wool rate from Portland to Boston, New York and Philadelphia of $1.00 per hundred pounds, under Exhibit "J," I. C. C. No. 812, but the combination of said transcontinental wool rate from Portland to Boston with the rates fixed by the Commission from eastern Oregon points to Portland would be less than the interstate rate for the direct transportation from eastern Oregon points to Boston, New York and Philadelphia

under Exhibit "K." In the following table set out in the bill, by way of illustration of the foregoing statement (Record, p. 19), the figures under the words "Present Rate" are the direct interstate rates under Exhibit "K" from eastern Oregon points to Boston, and the figures under the heading "Combined Rate" are the rates resulting from combining the transcontinental rate of $1.00 under Exhibit "J" from Portland to Boston with the third class rate under the Commission's order from the eastern Oregon points named in the table to Portland:

From	Present rate.	Combined rate.
Biggs.....	130	127
Arlington	146	141
Heppner.....	162	155
Umatilla	160	153
Pendleton	172	163
Elgin.....	195	182
Shaniko.....	150	147
Condon	160	153

For a fuller explanation the rates from Pendleton may be used. The through rate under Exhibit "K" from Pendleton to Boston is $1.72 (Record, p. 19). The transcontinental rate from Portland to Boston is $1.00, effective on the lines

of the appellant and its connections and on the lines of the Northern Pacific Railway Company and its connections (Record, p. 17). Under the Western Classification, wool takes the third class rate. Under tariff L-525, page 5 (Record, p. 203), the third class rate from Portland to Pendleton is 72 cents, and this is reduced by the Commission's order to 63 cents. There is, and can be, no justification for the making of a through rate of $1.72 on the direct shipment of wool from Pendleton east to Boston, while a rate of $1.63 could be obtained by shipping the wool first to Portland and thence to Boston. The appellant would be compelled to perform an increased amount of transportation service, and the appellant or connecting carriers of the local shipment to Portland would have to perform a terminal service in delivering the wool and again receiving it. Any such rate adjustment is an unjust discrimination in point of fact. Such unjust discrimination could be removed only in one of the following methods:

FIRST. By increasing the rate from Portland. Such action would prevent the appellant from competing with ocean carriers in the carriage of wool from Portland. This, in and of itself, would be a regulation of interstate commerce.

SECOND. By decreasing the rate from Pendleton. The Pendleton rate was duly published and filed with the Interstate Commerce Commission, and the Bill alleges (Record, p. 18) that such rate is reasonable. Any action of the State forcing a reduction of an interstate rate, lawfully published and filed, is certainly an interference with interstate commerce.

The adoption of either of these methods of removing the discrimination is clearly a regulation of commerce.

Louisville & Nashville R. R. Co. vs. Eubank, 184 U. S., 27.

In that case the railroad company established, in order to meet water competition, a rate of 12 cents per hundred pounds from Nashville, Tennessee, to Louisville, Kentucky, and had in effect a rate of 25 cents per hundred pounds from Franklin, Kentucky, to Louisville. The Constitution of Kentucky prohibited the charging of more for the shorter than the longer distance over the same line, in the same direction. Eubank shipped tobacco from Franklin and commenced an action to recover the difference between the 25 cent rate charged from Franklin and the 12 cent rate charged from Nashville.

The railroad company sought to defend on the ground that the rate from Nashville was made by water competition, and that business could not be obtained under any greater charge than 12 cents. The Supreme Court of Kentucky affirmed judgment in favor of Eubank, and in disposing of the question Mr. Justice PECKHAM said (p. 40):

> "The Nashville owner of tobacco wishes to have it transported to Louisville and asks the defendant to carry it. It responds that it would like to carry it at the rate of 12 cents per one hundred pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than twelve cents, and that if it were to carry at the rate of twelve cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that State, which would entail a loss in the business between those points, which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than twelve cents from the Nashville man. Is it an answer to this statement to say that the company can get

this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the State? If it be, is not the law which accomplishes this result a direct interference by the State with interstate commerce? And if it do not lower its State rates and in consequence must raise its interstate rates, in order to make its State rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the State, of that commerce which ought to be free therefrom?

"In *Hall v. DeCuir*, 95 U. S., 485, it was said: 'But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.'

"The vice of the provision lies in the regulation of the rates between points wholly within the State, by the rates which obtain between points outside of and those which are within the State.

"The facts in this case have been thus fully referred to for the purpose of showing

how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed, where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way regulate, to some extent, the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress."

In the *Eubank case*, the defendant would have been compelled to lower its State rates in order to remain in the business of the interstate transportation of tobacco from Nashville to Louisville. In the present case, the appellant, by reason of the order of the Commission, is compelled to lower its interstate rates in order that it may remain in the business of interstate transportation. Surely such a result is a regulation of interstate commerce.

If, however, the order of the Commission be allowed to go into effect, and the appellant be not compelled to take any action, and should

take no action, then the direct shipment of wool from Pendleton east to Boston would cease, and the course and current of transportation would be changed to a movement from Pendleton to Portland and thence to eastern destination. The rate from Pendleton on direct shipments of wool to Boston would be 9 cents per hundred pounds higher than the rates for an indirect transportation by way of Portland, or a difference of $1.80 per ton (Record, p. 19). Under such circumstances, how much wool would move direct from Pendleton to Boston, and why should any so move?

Without any change of the interstate rates of the appellant, the establishment of the Commission's rates would stop the direct shipment of wool from Pendleton to Boston to the same extent as if the State of Oregon by direct statute prohibited such movement. Would not such a result be, in and of itself, a regulation of interstate commerce?

Everything which has been said with reference to wool might be applied to all classes of traffic from the east, and to all traffic from California. The same discriminations would exist, the same changes in interstate rates would be forced, and if such discriminations were not cor-

rected, then the direct shipment of merchandise to eastern Oregon points from California and from points east of Missouri River would cease, and, in lieu thereof, there would be substituted a movement to Portland and a reshipment from thence to destination. The facts in this regard are alleged in paragraphs XVI and XVII of the bill (Record, p. 11). These paragraphs are as follows :

" XVI. For the purpose of illustrating the effect of the order, Exhibit 'I', upon the traffic of an interstate character, passing over the lines of railroad operated by your orator, your orator presents a table showing the rates specified in Union Pacific tariff I. C. C. No. 1578, on some commodities mentioned in said tariff, from Chicago and common points to La Grande and Baker City, Oregon, and also the rates which a shipper would pay for a transportation of the same commodity from Chicago and common points to La Grande and Baker City, provided such shipper caused his goods to be first transported to Portland at the rate fixed by the Transcontinental Terminal Tariff, and then caused said goods to be reshipped from Portland to destination under the rates attempted to be fixed and established by the Railroad Commission of Oregon in said order,

Exhibit 'I'. In said table the figures under the words 'present rate' are the rates fixed and established by Union Pacific tariff I. C. C. No. 1578, under direct shipment from Chicago and common points to La Grande and Baker City, and the figures under the words 'combined rate' are the rates which a shipper would pay by shipping his goods from Chicago and common points first to Portland and then reshipping them to destination. The following is the table hereinbefore mentioned :

Commodities.	From Chicago and common points to—			
	La Grande		Baker City	
	Present rate.	Combined rate.	Present rate.	Combined rate.
Bottles, (Glass) Common, (Glass) Common in Demijohns, Flasks, (Glass) Common in Boxes, Barrels or Crates, Str. or Mxd. C. L.	1.48	1.43	1.48	1.44
Coffee, Green, C. L.	1.52	1.48	1.52	1.49
Jars and Glasses, Fruit or Jelly, C. L.	1.49	1.43	1.50	1.44
Matches, C. L.	1.79	1.69	1.79	1.70

"It thus appears that if the rates attempted to be fixed by the Railroad Commission of Oregon, from Portland to points east of The Dalles by said order Exhibit 'I,' should go into effect, then your orator and the other companies concurring in Union Pacific tariff I. C. C. No. 1578, would have to reduce the rates so fixed and established by said tariff, or otherwise, all direct shipments of merchandise from Missouri River or common points and points east, to points in Oregon east of The Dalles, would cease, and such freight would first be transported to Portland and then reshipped to destination.

"XVII. As a further example of the effect which the enforcement of said order Exhibit 'I' would have upon the rates and tariffs now charged by your orator in connection with other carriers for the carriage of freight between the several States, your orator shows that the rates now in force and effect, and as shown by published tariffs of your orator and the San Francisco and Portland Steamship Company, jointly issued and filed with the Interstate Commerce Commission, are made by adding to the rates in force and effect by virtue of tariff No. L-525, from Portland to Baker City, La Grande, and other points east of The Dalles, certain arbi-

traries or local rates, which taken together form the through rate from San Francisco to such points and places in eastern Oregon. Said rates from San Francisco to such points are generally less than the combination of the local rate from San Francisco to Portland, and the local rate from Portland to destination, but such rates would be generally higher than the combination of the local rate from San Francisco to Portland and the rates attempted to be established by the said order, Exhibit 'I', from Portland to destination.

"The following table of commodities, selected as being representative in character, show the through rates in effect at the present time, from San Francisco, California, to La Grande and Baker City, Oregon, via the lines of your orator and the steamship line of the San Francisco and Portland Steamship Company, and the rate which would result from a combination of the local rate from San Francisco to Portland and the local rate from Portland to destination, attempted to be established by the said Railroad Commission of Oregon by its order Exhibit 'I'.

"The figures under the words 'present rate' are the present through rates upon the commodities indicated and the figures under the words

'combined rate' are the rates upon the same commodities resulting from the combination of the local rates by way of Portland:

Commodities.	From San Francisco, California, to—			
	La Grande		Baker City	
	Present rate.	Combined rate.	Present rate.	Combined rate.
Canned Goods, C. L.	.79	.78	.80	.79
Coffee, Green, C. L.	.79	.75½	.80	.76½
Dried Fruits, C. L.	.95	.94	.95	.95
Hardware, any quantity subject to second class rates...	1.34	1.23	1.40	1.24
Sugar, C. L.....	.76½	.73	.77½	.74

"As a further example of the effect which the enforcement of said order, Exhibit 'I', would have upon the rates now charged by your orator, in connection with other carriers upon freight transported between other States, your orator shows that the rates in force and effect and as shown by the published tariffs of your orator and the Southern Pacific Company, jointly issued and filed with the Interstate Commerce Commission, are made by adding to the rates in force and effect under tariff L-525

from Portland, Oregon, to Baker City, La Grande, and other points in Oregon east of The Dalles, certain arbitraries or local rates which, taken together, form the through rate from San Francisco to such points and places. Such rates are generally less than the combination of the local rate from San Francisco to Portland and the local rate from Portland to destination, but such rates would be generally higher than the combination of the local rate from San Francisco to Portland and the rates attempted to be established by the said order, Exhibit 'I', from Portland to destination.

"The following table of commodities, selected as being representative in character, shows the through rates in force at the present time, and the rates which would result from the combination of the local rate from San Francisco to Portland and the rate from Portland to destination attempted to be established by said Railroad Commission of Oregon by its order, Exhibit 'I'. The figures under the words 'present rate' are the through rates upon commodities indicated, from San Francisco to La Grande and Baker City respectively, and the figures under the words 'combined rate' are the rates which would result from combining the locals from San Fran-

cisco to Portland and from Portland to destination, to wit:

Commodities.	From San Francisco, California, to—			
	La Grande		Baker City	
	Present rate.	Combined rate.	Present rate.	Combined rate.
Canned Goods, C. L.	.82	.76	.83	.77
Coffee, Green, C. L.	.82	.76	.83	.77
Dried Fruits, C. L.	.98	.87	.98	.88
Hardware (Less carloads) taking 2d class rates	1.40	1.24	1.46	1.25
Do. (Car loads)	1.37	1.21	1.43	1.22
Sugar, C. L.	.79½	.73½	.80½	.74½

"And so it is, that if such rates so undertaken to be established by said order, Exhibit 'I', should not be enjoined, and should go into effect, your orator and other carriers engaged in carrying interstate traffic from points in California to points in Oregon east of The Dalles, would have to reduce rates now in force from California to such eastern Oregon points, or otherwise all interstate shipments from California to such eastern Oregon points would cease, and all such freight would be shipped from California to Port-

land, and thence shipped locally from Portland to destination."

What merchant at La Grande (Record, p. 13) would pay from six to sixteen cents more per hundred pounds for the direct transportation from San Francisco of canned goods, coffee, dried fruits, hardware and sugar? Would not such eastern Oregon merchant be practically forced by the order of the Commission to purchase his goods in Portland or make an arrangement for the transshipment thereof unless the appellant corrected the unjust discrimination by reducing its interstate rates from San Francisco?

Paragraph XXII of the bill (Record, p. 15), is as follows:

"Certain persons in Baker City, Oregon, are engaged in the jobbing business, and are attempting to sell in Baker City and nearby places, goods originating at points and places east of the Missouri River, and goods originating in California, in competition with persons engaged in the jobbing business at Portland, Oregon. As will be seen by reference to tariffs, Union Pacific I. C. C., No. 1578, transcontinental terminal tariffs, and tariff No. L-525, hereinbefore exhibited as part of this bill, a Baker City jobber pays a freight rate from the point of

origin in the east, or in California, on the goods so sold by him, generally equal to the carload rate to Portland, plus the carload rate from Portland to Baker City, and then has to pay the less than carload rate from Baker City to the point of distribution; and the Portland jobber has to pay the carload rate from point of origin in the east or California, to Portland, and the less than carload rate from Portland to destination. So it is that the profit of the Baker City jobber, and his ability to sell goods, depends upon the difference between the carload rate from Portland and the less than carload rate from Portland to the point of destination. A comparison of the rates established by tariff No. L-525 with the rates attempted to be established by the order, Exhibit 'I', taken in connection with the western classification, shows that said order, Exhibit 'I' greatly decreases the difference between the carload rates from Portland and the less than carload rates from Portland, so that interstate traffic originating in the east and in California, and so in the past distribution from Portland and from Baker City respectively, can only be distributed advantageously and with profit, from Portland to all points in eastern Oregon, and thereby such order, Ex-

hibit 'I', attempts to regulate the movement, as well as the rate charged, upon such interstate traffic, to the exclusion of, and contrary to, the control which should properly be exercised by Congress, under the Constitution of the United States, and by the Interstate Commerce Commission, pursuant to the Act to Regulate Commerce, hereinbefore mentioned, and therefore said order, Exhibit 'I' is void."

This paragraph should, of course, be read in connection with paragraphs XVI and XVII of the bill, and from all of these paragraphs it will be seen that the direct carload rate from points of origin in the east and in California to Baker City would as the result of the rate adjustment established by the Commission have been but little higher than the carload rate from the point of origin to Portland plus the less than carload rate to Baker City. The court discussed this matter in the first opinion (Record, pp. 68, 69), and said:

> "This is only an illustration of how rate-making may destroy and build up jobbing centres, considering the fact stated to be true, and the deduction legitimate. But transportation companies do not have, nor can they longer claim, a monopoly upon

rate-making. * * * If this kind of traffic, with the freight rate imposed upon it by the State, is of such proportions and such percentage as to affect trade in interstate merchandise, and therefore render it advantageous to interstate lines to change their rates so as to control the trade in certain channels, that is not a trenching upon the exclusive authority of congress to regulate interstate commerce. The interference is but incidental, and flows from a perfectly legitimate regulation of freight rates by the State, an altogether natural movement of trade; and the condition is absolutely beyond the control of Congress."

In view of the fact that all of the traffic handled through Baker City is interstate traffic, paragraph XXII of the bill clearly shows that the order of the Commission hinders and prevents the transportation of interstate commerce and its subsequent distribution therefrom. While it is true that transportation companies no longer have a monopoly upon rate-making it is respectfully submitted that no State commission should be given a monopoly to regulate rates upon commerce which is clearly interstate.

It is respectfully submitted that the facts alleged in the Bill, and necessarily admitted by

the demurrer, show that the rates between Portland and points in eastern Oregon are so closely intermingled with interstate rates that the order of the Commission reducing such rates directly regulates interstate commerce and the course of transportation thereof. Such order should, therefore, be declared to be void notwithstanding the fact that the order apparently attempts only to regulate rates between points in Oregon. The appellant cannot avoid the doing of business between local points in Oregon, and by the attempted regulation must submit to a direct reduction in its interstate rates or the increased burden of transporting practically its entire interstate traffic by way of Portland. Such a condition of things brings the case clearly within the decision of this Court in *Western Union Telegraph Co. vs. Kansas*, 216 U. S., 1.

If the appellant did not change its interstate rates, then the very continuance of such interstate rates would subject localities to unjust discriminations. Can the appellant, under the Interstate Commerce Act, continue to charge more for the direct transportation of wool from Pendleton to Boston than it charges from Pendleton to Portland and thence to Boston? Can the appellant continue to charge more for the direct

transportation of merchandise from all eastern points to Baker City and Pendleton than it charges for the transportation from the same eastern points to Portland and thence back to Pendleton or Baker City? Such rates could not be continued for the reason that the provisions of the Interstate Commerce Act directly relating to both of these interstate rates, would compel the defendant to cease such discriminations.

If such discriminations could be continued, and thereby the course of traffic be changed from direct shipment to indirect shipment by way of Portland, would not such changes in the course of transportation be a regulation of interstate commerce?

IV.

The Oregon Commission rates create an unjust discrimination against points in Washington.

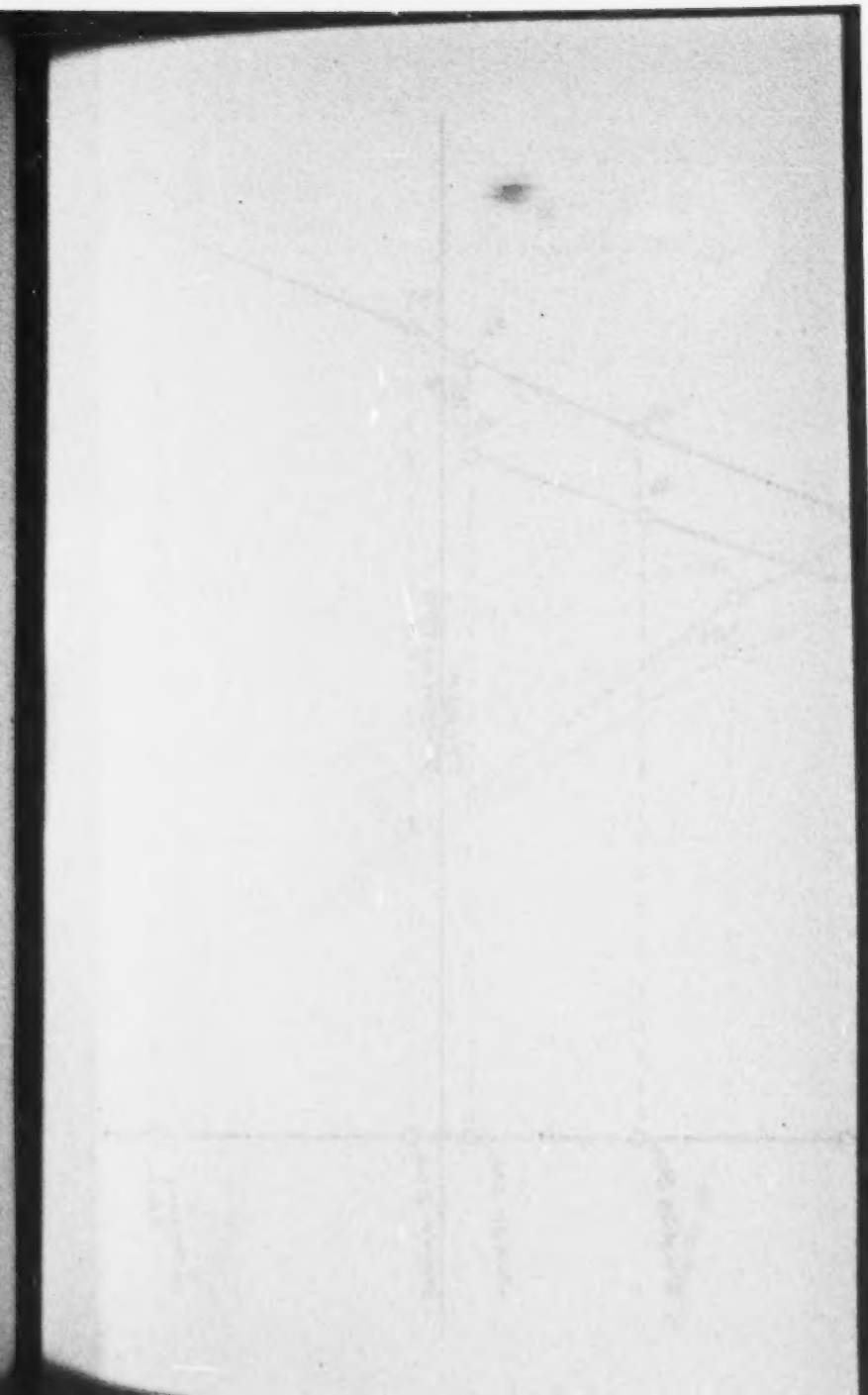
Unless the appellant voluntarily reduced, or was compelled to reduce, its rates between Portland and eastern Washington points fixed by tariff L-525, the Commission order rates in Oregon would

have had the effect of making a sharp and decided raise in rates from the last point in Oregon to the first point in Washington. This is illustrated by an examination of tariff L-525.

Under tariff L-525 the first class rate to Arlington, Oregon, 141 miles east of Portland, is 65 cents; the rate to Castle Rock, Oregon, 161 miles east of Portland, is 75 cents; the rate to Umatilla, Oregon, 186 miles east of Portland, is 85 cents (p. 5 of tariff, Record, p. 203); the rate to Juniper, Oregon, 206 miles east of Portland, is 93 cents; and the rate to Wallula, Washington, 213 miles east of Portland, is 97 cents; and the rate to Simmons, Washington, 244 miles from Portland, is $1.09 (p. 6 of tariff, Record, p. 203). The order of the Commission (Record, p. 183) requires that the rates above mentioned shall be reduced by an amount equal to one-sixth of the difference between 25 cents (the existing first class rate to The Dalles) and the first class rates above mentioned, rejecting fractions of a cent as prescribed by that portion of the order found on page 184 of the Record. Applying this formula the first class rates to the various Oregon points would be as follows:

Arlington	$.51
Castle Rock	.69
Umatilla	.75
Juniper	.88

Commencing with first class rate of 25 cents at The Dalles as the base (such rate being unchanged by the Commission order) the rate scale under tariff I.-525 would be graphically represented as follows after the Commission order went into effect, the rates to Washington remaining unchanged:



Scale—Horizontal 1 inch=20 miles.
Vertical 1 inch=20 cents.

In the foregoing illustration, the green line represents the rates from Portland fixed by tariff L-525 to various points as far east as Simmons, Washington. The red line represents the rates fixed by the Commission order to Juniper, Oregon. The line running sharply upward from the end of the red line to the green line represents the sharp rise in rates which results in the rates from Portland to Washington points, if the Commission order rates are enforced in Oregon and no corresponding reduction is made by appellant in the rates to Washington points.

Any such rise is necessarily an unjust discrimination and such unjust discrimination cannot be avoided except by a reduction of the rates of the appellant in Washington to a scale relatively just when compared with the State rates in Oregon.

Unjust discriminations are prohibited in broad terms by the Interstate Commerce Act, and no reasonable construction can be placed upon such act limiting its prohibitions to discriminations caused solely by interstate rates.

Upon this point the attention of the Court is called to the opinion of SANBORN, Circuit Judge,

in *Shepard v. Northern Pacific Ry. Co.*, 184 Fed. Rep., page 796, as follows:

"But counsel insist that, if Congress had the power to forbid this discrimination, it did not exercise it because it declared in the proviso to section 1, that the provisions of the Interstate Commerce Act should not apply to transportation wholly within one State. But the main object of the act was to prevent every undue discrimination between parties and between localities. When it was enacted there was a crying evil in such discriminations, an insistent public demand for the remedy thereof, and a determined effort by the legislators to make the prohibitions of such discriminations as broad, searching, and effective as the Congress had the power to make them. It had, as we have seen, ample authority to forbid discriminations wrought by differences between intrastate and interstate rates, but none to prohibit discriminations caused by differences in rates for transportation wholly within a State. The act prohibits any undue discrimination in any respect whatever between localities under similar circumstances and conditions by any common carrier subject to its provisions. In the light of these facts, the natural and

reasonable construction of the proviso in section 1 is that it was inserted out of abundance of caution to make sure that the broad terms of the act did not go beyond the constitutional power of the Congress and directly regulate intrastate commerce more than was necessary completely to regulate interstate commerce, and that it has no farther effect upon the subject of discrimination now under discussion. The evil the act was passed to remedy, the main purposes of its passage, the public demand for a prevention of all discriminations, the patent effort of the legislators to meet this demand, and the broad terms of the prohibitions themselves compel the conclusion that the Congress intended to exercise, and that by this act it did exercise, its constitutional power to prevent discriminations of the character here in question to its utmost extent, and that the companies were and are prohibited thereby from making or maintaining the unjust discriminations between localities which the maintenance of their former lawful interstate fares and rates and the intrastate rates prescribed by the acts and orders of the officers of the State would necessarily affect."

Conclusion.

The decree of the Circuit Court should be reversed and the demurrers to the amended bill overruled.

Respectfully submitted,
W. W. COTTON,
MAXWELL EVARTS,
Of Counsel for Appellant.

Office Supreme Court, U. S.
FILED.
OCT 14 1911
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 159.

THE OREGON RAILROAD & NAVIGATION COMPANY,
A CORPORATION, APPELLANT,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON,
OSWALD WEST, and A. M. CRAWFORD,
APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.

BRIEF FOR APPELLEES.

A. M. CRAWFORD,
Attorney-General of the State of Oregon.
CLYDE B. AITCHISON,
JOSEPH N. TEAL,
of Counsel for Appellees.

In the Supreme Court of the United States

October Term, 1911

THE OREGON RAILROAD AND NAVIGATION COMPANY,
a Corporation,
Appellant,

v.

THOMAS K. CAMPBELL,
CLYDE B. AITCHISON,
OSWALD WEST, and
A. M. CRAWFORD,
Appellees.

Brief for Appellees.

Appeal from the Circuit Court of the United States for the District of Oregon.

STATEMENT.

The case is before the Court upon appeal from a decree of the Circuit Court of the United States for the District of Oregon, dismissing the bill of complaint and amended bill of complaint of The Oregon Railroad & Navigation Company against Thomas K. Campbell, Clyde B. Aitchison, Oswald West and A. M. Crawford. The first three named defendants together con-

stituted the Railroad Commission of Oregon, and A. M. Crawford was and is Attorney General of said State (Rec. 4).*

The bill and amended bill challenged the constitutionality of the act of the Legislative Assembly of the state of Oregon creating the Railroad Commission of Oregon, the powers granted the Commission under said act and the validity of an order of said Commission affecting certain class rates charged for the transportation of commodities thereunder over the lines of appellant's railways within the state of Oregon. Pending the hearing a temporary restraining order was prayed for, restraining defendants from enforcing the order. The bill prayed that upon the hearing a temporary injunction be issued enjoining defendants from attempting to enforce said order, and for a permanent injunction and other relief therein set out.

Demurrers were interposed to the bill and amended bill which were sustained by the Court below and the decree entered now appealed from.

Appellant is an Oregon corporation, operating various main and branch lines of railway in Oregon, Washington and Idaho. At Huntington, Oregon, it has physical connection with the lines of the Oregon Short Line Railroad Company, which, together with other connecting lines, forms a through line or railway for the transportation of passengers and freight from various points of origin in eastern states to various points and places in the state of Oregon. Appellant carries on both intrastate and interstate commerce.

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*References to Record are to pages of the printed record.

The Railroad Commission of Oregon was created by act of the Legislative Assembly of the state of Oregon in the year 1907 (Rec. 3).

Under the provisions of this act a complaint was filed with said Commission by the Portland Chamber of Commerce attacking the class rates in effect over and on the appellant's main and branch lines between Portland, Oregon, and other points and places in said state, as excessive, unjust and unreasonable.

The rates complained of appear, with other rates, in the tariff of appellant effective January 1, 1907, No. L-525, O. R. C. No. 39, I. C. C. No. 1146 with supplements amendatory thereof (Rec. 7).

After due hearing and investigation, in which the appellant appeared and participated, the Commission found certain of the class rates named in said tariff over the lines of appellant within Oregon between Portland and other points and places in said state east of The Dalles to be unjust and unreasonably high. The Commission further found and determined reasonable rates to be charged in the future for the transportation of freight by the appellant under such class rates between Portland and the points east of The Dalles within the state of Oregon. In accordance with this determination, on April 22, 1908, it condemned the existing rates and by order duly made and entered fixed the class rates which it had determined to be reasonable, to be thereafter charged for said transportation between said points. The rates ordered were lower than those then in effect. The order was duly served and appellant given twenty days after the service thereof to comply therewith (Rec. 9, 182).

Thereafter, on May 11, 1908, appellant filed the bill of complaint in the Circuit Court below, and a temporary restraining order was issued as prayed.

Defendants appeared to show cause and proof was submitted by both parties thereon; and at the same time defendants filed a general and special demurrer to the bill. The case was submitted both upon the demurrers and the application for a preliminary injunction.

On September 28, 1909, the Court below sustained the demurrers. (173 Fed. Rep. 957, Rec. 39.)

On November 18, 1909, an amendment to the bill of complaint was filed (Rec. 77), to which a general and special demurrer was interposed (Rec. 81, 86). On February 21, 1910, the Court below sustained the demurrers (177 Fed. Rep. 318, Rec. 86) and on March 4, 1910, decree was entered sustaining the demurrers, dismissing the amendment to the complaint and the amended complaint and vacating the restraining order and awarding defendants their costs and disbursements (Rec. 89).

Shippers presented to appellant certain claims for overcharges collected by it pending the hearing and while the restraining order was in effect, payment of which was refused on the grounds that the particular shipments constituted interstate commerce. Thereupon W. S. Smallwood filed a petition in intervention setting forth the facts as to certain shipments and praying for an order requiring the appellant to show cause why the said claims were not paid (Rec. 90).

The question was submitted on the petition in intervention, and on July 11, 1910, the Court below filed its opinion, and held that the shipments embraced in

the petition were not interstate commerce, but on the contrary were intrastate commerce and directed the payment of the excess charges collected thereon. (180 Fed. Rep. 258, Rec. 96.) Findings, judgment and decree were entered in accordance therewith (Rec. 100).

On September 2, 1910, a petition for appeal to this Court was filed (Rec. 101), and the appeal was allowed and perfected.

THE PLEADINGS.

As this cause was heard and determined on complaint, amended complaint and demurrers, a statement of the allegations is necessary to disclose the issues. It is not considered essential to set out the voluminous bill and its amendment *in haec verba*, as on argument more extended references will be made to certain parts thereof, but the allegations will be summarized fully enough to disclose their intent.

ALLEGATIONS OF THE COMPLAINT.

Paragraphs I to VI inclusive are the introductory portions and set out the organization of complainant, the location of its lines of railway, that it is engaged in both intrastate and interstate commerce; that its principal business is interstate commerce, less than 20% being local within Oregon. The official positions of defendants and their citizenship and residence is set forth in paragraph II (Rec. 3). Paragraph III (Rec. 3) sets forth the fact of the passage of the Railroad Commission Act. A copy of the act will be found at page 115 of the record.

Paragraph IV (Rec. 4) sets up the appointment of the defendant members of the Railroad Commission.

Paragraph V sets forth that A. M. Crawford is the Attorney General of the state of Oregon and that Section 57 of the Railroad Commission Act makes it his duty to enforce the provisions thereof (Rec. 4).

Paragraph VI alleges that the suit is one arising under the constitution and laws of the United States, in that it seeks among other things to enjoin the defendants from attempting to enforce the provisions of a certain order thereafter referred to in the complaint as to rates and charges for the transportation of freight on the railroads of the complainant, and from instituting any action or proceeding against complainant or its officers, etc., on account of any violations of the terms or provisions of said order or from attempting to enforce the provisions of the Railroad Commission Act, for the reason that the act and the order and all the tariffs, rates, charges and regulations assumed to be prescribed by the order are in violation of the constitution of the United States and an Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce" and acts amendatory thereof and supplemental thereto. That the revenue of complainant from the interstate transportation of freight is large and the portion thereof affected by the pretended order of the Railroad Commission, if enforced, and the rates therein mentioned be put into effect, will largely exceed the sum of $2000 exclusive of interest and costs, etc. (Rec. 4).

Paragraphs VII to XIII inclusive (Rec. 5-9) allege that the complainant has physical connection with the Oregon Short Line, and it with the Union Pacific Railway, and these connect with various lines of rail-

road of the Chicago & Northwestern Railroad Co., and the Chicago, Rock Island & Pacific Railway Co. and the Chicago, Milwaukee & St. Paul Railway Co.; and that by these connections and through tariffs published and established by the companies concerned, commodities of all kinds have moved from Chicago and other points located upon and east of the Missouri River to Portland, Oregon, and to places east of The Dalles reached by the lines of the complainant.

That the Union Pacific Railroad Co., the Oregon Short Line Railroad Co. and the complainant issued and published a tariff covering the transportation of freight between said eastern points and various stations on complainant's line east of The Dalles, which was duly filed with the Interstate Commerce Commission and became effective after January 2, 1904, and is in effect and operation with some amendments at the present time. This tariff is numbered "U. P. R. R., I. C. C. No. 1578" and with three supplements thereof was made a part of the complaint (Rec. 6, 161, 173, 175, 176).

The complainant and various other companies promulgated a tariff naming class and commodity rates on merchandise and commodities effective January 18, 1904, from New York and common points and other points in eastern territory, including Missouri River common points, to certain North Pacific coast terminals, including Portland, designated "Transcontinental Freight Bureau No. 4-C," and which is known as the "Transcontinental Terminal Tariff." Rates under this tariff are named to no point or place on the lines of the complainant's railroad east of Montavilla, Oregon.

(Montavilla is a suburban station within the corporate limits of Portland.)

That complainant and other lines of railroad have been transporting large quantities of merchandise and commodities in accordance with the rates and conditions in said tariff. A copy of this tariff and its supplement, marked Exhibit F and Exhibit G, were made a part of the complaint, but are not printed in the record.

It is alleged that the rates mentioned in the foregoing tariffs are in effect and are the only lawful rates which the complainant and other carriers parties thereto can charge between the points and places mentioned in the tariffs and supplements thereto.

That complainant has in effect a freight tariff naming class and commodity rates based upon the existing Western Classification between Portland, East Portland, Albina and St. Johns, Oregon, and the stations on its lines in Oregon, Washington and Idaho, effective January 1, 1907, designated as "No. L-525, I. C. C. No. 1146." A copy of this tariff marked Exhibit H (Rec. 186) was attached to the complaint and made a part thereof. This tariff was published and filed with the Interstate Commerce Commission and with the Railroad Commission of Oregon and has been since January 1, 1907, in full force and effect. It is alleged that the rates fixed by said tariff and the supplements are the only rates which complainant is authorized to charge for the transportation of freight described in the tariff between Portland, East Portland and St. Johns and various points in Oregon, Washington and Idaho east of The Dalles, Oregon, "and are reasonable rates." That complainant and the Sea

Francisco & Portland Steamship Company (which operates a line of steamships between Portland and San Francisco), have heretofore issued and have now in operation a joint freight tariff between San Francisco, California, and Portland and points on the complainant's line in Oregon east of The Dalles, designated as "O. R. & N., I. C. C. No. 967." A copy of this tariff and supplement was attached to the bill and marked Exhibit N. That since June 1, 1905, the Steamship Company and complainant have been engaged in transporting merchandise between San Francisco, California, and points on the lines of complainant east of The Dalles, at the rates and under the conditions named in the tariff and such tariff is now in full force and effect. That the Steamship line and the complainant constitute a through route, making through rates under a common management and control and subject to the Interstate Commerce Act, and acts amendatory thereof; and as such through route are subject to the jurisdiction of the Interstate Commerce Commission; and that the rates "are reasonable rates;" that the rates so fixed are made up by adding certain arbitraries or local rates to the rates established by tariff No. L-525 from Portland to the various points and places in Oregon east of The Dalles.

That the Southern Pacific Company (the railroad lines of which connect with the lines of complainant at Portland), and complainant have adopted and have now in effect a joint tariff covering transportation from San Francisco and other California points, and Portland, and to all points in Oregon east of The Dalles on complainant's lines. Said tariff is designated as

Southern Pacific I. C. C. No. 2180. The Southern Pacific and complainant have transported merchandise from San Francisco and other California points to Portland, and points east of The Dalles, in Oregon, under said tariff, and the same constitutes interstate commerce; that the through rates from California to points east of The Dalles in Oregon consist mainly of a combination of the rates fixed by tariff No. L-525 from Portland to such points east of The Dalles and certain arbitraries or local rates and "are reasonable rates."

Under paragraph XIV (Rec. 9), it is alleged that under date of April 22, 1908, the Railroad Commission of Oregon made and entered the order in question, which was served upon the complainant on April 23, 1908, to become effective 20 days thereafter. This order, Exhibit I (Rec. 182), was made part of the complaint. By the order it was found and declared *inter alia*, that the class rates now in effect, under tariff No. L-525 with supplements amendatory thereto, over and on complainant's lines in Oregon between Portland and all points in Oregon on complainant's lines east of The Dalles, were unjust and unreasonably high, and complainant was directed to cease and desist from charging any higher rates for transportation between such designated points within the state of Oregon than the class rates prescribed by said order; and that in lieu of said class rates established by said tariff No. L-525 the complainant should substitute and adopt the class rates specified in said order, which were to all points east of The Dalles greatly less than the rates established by tariff No. L-525 covering the same points.

Appellant was directed to prepare and file new tariffs within 20 days of the service of the order, publishing and establishing the rates so prescribed.

Paragraph XV (Rec. 10) alleges that at least 70% of the traffic carried and hereafter to be carried from Portland to such points east of The Dalles under the class rates fixed by tariff L-525 originates and will originate on points along or east of the Missouri River, or in California, and was and will be first transported to Portland and from thence under the class rates of L-525, or under the class rates established by the order of the Railroad Commission; and large quantities of like goods are transported directly from the east to points in Oregon east of The Dalles by complainant and allied lines at and under rates fixed by Union Pacific tariff I. C. C. No. 1578, and from points in California to points in Oregon east of The Dalles, at rates fixed by tariffs in force from California to points in Oregon east of The Dalles as alleged. That by U. P. tariff I. C. C. No. 1578 it was provided that where the rate to or from the point of shipment to Portland added to the local rate under L-525 from Portland to such Eastern Oregon points is lower than the through rate under tariff No. 1578, then the combination of such transcontinental and local rate will govern; that the tariff rates fixed by tariff No. 1578 applying to points on complainant's lines in Oregon east of The Dalles, and particularly the class rates, are generally higher than the combination rates, and the commodity rates fixed by the transcontinental tariff are generally somewhat less than the combination of the transcontinental terminal rate to Portland added to the tariff under L-525, and "are

reasonable rates," but that such commodity rates so fixed by tariff No. 1578 are greater than the combination of the transcontinental rates and the rates fixed by the Railroad Commission to said points east of The Dalles.

Paragraphs XVI and XVII (Rec. 11) give illustrations as to the effect of the enforcement of the order of the Commission on rates from certain designated eastern points and from California points to certain points in Oregon.

Under paragraph XVIII (Rec. 13) it is alleged that, should the Railroad Commission's order become effective, it would affect not only the interstate rates specifically mentioned for the purpose of illustration, but every other interstate rate now in force and effect from Missouri River common points and points east thereof to points in Oregon east of The Dalles, and from points in California to like points in Oregon; and that the order necessarily amounts to an attempt to regulate the commerce between the several states and is an infringement upon the exclusive power of Congress and of the Interstate Commerce Commission.

Under paragraph XIX (Rec. 14) it is alleged that, should complainant attempt to comply with the order, it would be compelled to violate the Act of Congress and the regulations promulgated by the Interstate Commerce Commission in that no interstate rate contained in any of the interstate tariffs hereinbefore mentioned can be changed without giving 30 days notice, and in this particular the order is an attempt to regulate interstate commerce and is void.

By paragraph XX (Rec. 14) it is alleged that the rates established by tariff L-525 are lower than those

established for similar traffic from any point on complainant's lines, other than Portland, to any other point on complainant's lines in Oregon, Washington or Idaho, and that the movement of traffic under such tariffs from Portland to points in Washington or Idaho is large and the revenue derived therefrom is great; that the rates established by such tariff No. L-525 from Portland to points east of The Dalles are lower than the rates charged by any other railroad company in Oregon, Washington or Idaho for the transportation of similar traffic for the same distance; that the rates attempted to be established by the said order are lower than the rates fixed and established by said tariff No. L-525 and are unreasonably low and unjust to the complainant. It is alleged that while the immediate effect of such order, if it could be confined strictly to the state of Oregon, might leave complainant a fair income upon its entire business, nevertheless if the rates attempted to be established by the said order be applied to the interstate business directly affected thereby, and if the percentage of reduction effected by such order be applied to the local business of complainant in the states of Oregon, Washington and Idaho, which local business is now being transacted upon rates higher than those fixed by tariff L-525, it will operate to confiscate the property of the complainant and to deprive it of property without due process of law in violation of the constitution of the United States, because such reductions will leave complainant without any fair net earnings upon its property.

Paragraph XXI (Rec. 15) alleges that, if the state of Washington should see fit to establish rates in Wash-

ington equal to the rates established by the order in question, the result would be that complainant's interstate rate for the transportation of freight between points in Oregon and points in Washington could not be lawfully or practically greater than the sum of the local rates so attempted to be established by the states of Oregon and Washington, and therefore the interstate rate would be wholly and necessarily established by the respective states to the exclusion of and contrary to the sole and exclusive control which should be properly exercised thereover by Congress, pursuant to the Act to Regulate Commerce.

Paragraph XXII (Rec. 15) alleges the effect upon the business of those engaged in jobbing merchandise in Baker City, Oregon. It is alleged that the profit of the Baker City jobber and his ability to sell goods depend upon the difference between the carload rate from Portland and the less than carload rate from Portland to the points of destination. It is alleged that the order greatly decreased the difference between the carload rates from Portland and the less than carloads from Portland, so that interstate traffic originating in the east and in California can only be distributed advantageously and with profit to all points in eastern Oregon from Portland, and thereby the order unconstitutionally attempts to regulate the movement as well as the rate charged upon interstate traffic.

Paragraph XXIII (Rec. 16) alleges that a large number of railroad companies, among others the Northern Pacific Railroad Co., which operates a railroad line from Portland to St. Paul, Minnesota, and has a physical connection with the Chicago, Burlington & Quincy

Railroad Co. and other railroads, have concurred in the publishing and filing of the rates established by the Transcontinental Terminal Tariff; that these rates apply from eastern points to Portland by way of the lines of the Northern Pacific Railroad Company and its connections, and that said company and its connections are engaged in carrying large quantities of freight under said tariff from eastern points to Portland; that the rates fixed by said transcontinental tariff are very low and are less than reasonable rates for the service performed on account of water competition from eastern points to Portland and other North Pacific coast terminals; that the direct effect of enforcing the rates established by said order would be to compel complainant and its connecting lines, parties to tariff I. C. C. No. 1578, to reduce the rates established by said tariff from all eastern points to all eastern Oregon points, to an amount equal or less than the combination of the transcontinental terminal rates and the rates in question, and thus compel complainant and other carriers to transport freight from points east of the Missouri River to points east of The Dalles for less than reasonable rates, or compel complainant and connecting carriers to cease the direct carriage of said traffic from points east of the Missouri River to points in Oregon east of The Dalles, and allow such traffic to be first transported to Portland, in part by ocean, or in part by the lines of the Northern Pacific Railroad Co., thus diverting large quantities of such interstate traffic from the lines of complainant and its connections, to the lines of other carriers.

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Paragraph XXIV (Rec. 17) sets out the effect of the order on rates on wool. It alleges that rates on wool have been established to Boston and other eastern points under certain conditions of $1 per hundred pounds from Portland; that this rate also applies over the Northern Pacific Railroad Co.; that the rate is low and less than reasonable, and is made as a result of water competition from Portland to Boston; that wool in grease, baled as provided in the tariff, takes a third class rate under the western classification; that under a commodity tariff filed by the complainant and various other lines connecting therewith, rates have been named on wool from various points in eastern Oregon over complainant's lines of railroad east of The Dalles to Boston and other eastern points; that the rates established by these tariffs are equal to or less than a combination of the third class rate fixed and established by tariff No. L-525 from said points in Oregon east of The Dalles to Portland, and the rate of $1 per hundred pounds fixed and established from Portland to Boston and other eastern points; that the third class rate fixed by said order from points in Oregon east of The Dalles to Portland added to the rate on wool from Portland to Boston, of $1 per hundred would be less in nearly every case than the legal rates from the same eastern Oregon points to Boston, as fixed in the tariffs referred to. It thus appears that, if the rates attempted to be fixed by the order should go into effect, complainants and other companies, concurring in the tariffs referred to, would be compelled to reduce the rates so established by such tariffs on such wool from points in eastern Oregon to Boston, Massachusetts, or otherwise the direct shipment

of wool from such points in eastern Oregon to Boston would cease, and such wool would be first transported to Portland and then reshipped to Boston, and complainant and other connecting lines would be subject to the risk and injury of having such wool shipped from Portland over lines competing with those of complainant in the carriage of wool from Portland to Boston.

Paragraph XXV (Rec. 19) alleges that the rates charged by complainant between Portland and The Dalles established by tariff L-525, are unreasonably low, made so by reason of water competition. That by the order of the Railroad Commission the rates to points east of The Dalles are based upon the rates charged by complainant between Portland and The Dalles, and the rate of increase of the rates to points east of The Dalles fixed by said order is unreasonably low and unjust to complainant, and has the effect of making such rates unreasonably low and unjust to complainant, and to some of the points east of The Dalles less than the rates to The Dalles; and therefore the order provided that the rates to points east of The Dalles might equal the present rates to The Dalles, when the application of the formula prescribed would reduce rates below the present rates between Portland and The Dalles. That the application of the present rates between Portland and The Dalles to points beyond The Dalles causes such rates beyond The Dalles to be unreasonably low and unjust to complainant.

That the order fixes rates upon complainant's branch lines the same for equal distances as upon its main line; that the cost of service upon each of said branch lines is much greater than upon the main line, the traffic is

less and the service rendered the public reasonably worth more than for corresponding distances upon the main line, so that the rates ordered upon complainant's branch lines are unreasonably low.

That by the order complainant would be permitted to charge but two cents more for transporting freight from Portland to Baker City than from Portland to La Grande upon first class freight; one cent more upon classes 2, 3, 4, 5, A and B, and nothing additional upon classes C, D and E, but that a difference is made in the rates to La Grande as compared with the rates to Pendleton of from five to twenty-five cents per hundred pounds upon the various classes, and a difference in rates to Pendleton as compared with the rates to Umatilla of from three to fifteen cents per hundred pounds. The distance from Portland to Umatilla is 186 miles, to Pendleton 230 miles, to La Grande 305 miles and to Baker City 356 miles. That the grades are so heavy between La Grande and Baker City, that the cost of operating a train from La Grande to Baker City is greater than in hauling a train upon a level grade; that between Pendleton and Umatilla there is no grade. It is alleged such adjustment of rates is arbitrary and unreasonable, and is founded upon no circumstances and conditions affecting the cost and value of the service, and that the entire basis of rates, and the rates fixed by said order, are arbitrary and unreasonably low and unjust and should be set aside, for the reason that said Commission had no power to establish arbitrary, unjust and unreasonable rates.

Paragraph XXV-a (Rec. 21) alleges that no adequate nor proper remedy is afforded for the protection

of complainant against the alleged injustice or unlawfulness of the tariff fixed by the order of the Railroad Commission, and that the penalties prescribed for the violation of the order are so severe and drastic as to render it confiscatory for complainant to attempt to litigate against an order or maintain its rights and have reasonable rates established affecting traffic upon its lines. The particular provisions complained of cover damages, attorney's fees, penalties, and provisions for review by the courts. It is alleged that by reason thereof the complainant is denied equal protection of the laws, and deprived of its property without due process of law.

Paragraph XXVI (Rec. 22) sets out Article III, Section 1, of the constitution of the state of Oregon, as follows:

> "The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

It is then alleged that by the Act of the Legislative Assembly creating the Railroad Commission, there is conferred upon the defendants, as railroad commissioners, legislative, executive and judicial powers, and legislative and judicial powers, and legislative and administrative powers, and judicial and administrative powers in contravention of such constitutional inhibition. Examples are given as to what is alleged to be an uncon-

stitutional delegation of power. It is alleged that under Section 22, the Commission has power, if upon investigation of any existing rate or classification it shall determine it is unreasonable, to fix and substitute a rate or classification it determines to be just. It is alleged that the act of determining whether the rates should have been charged is a judicial act and the act of fixing and establishing a new rate for the future is a legislative act. It is alleged that Section 30, providing for the establishment and apportionment of a joint rate over different lines, constitutes both a legislative act and a judicial act. So also as to Section 28, providing for the construction, proper care and conduct of station houses.

Paragraph XXVII (Rec. 24) contains the usual allegations that the Commission and the Attorney General are threatening to put the tariff established by the Commission into effect, and to prosecute complainant, its officers, etc., for any disregard of the provisions thereof.

Paragraph XXVIII (Rec. 25) contains the usual averments to the effect that, if complainant shall fail to observe the order of the Commission, it will result in actions against complainant, or in criminal proceedings against its officers and employes, and in an endless number of actions at law and criminal proceedings; that complainant has no plain, speedy and adequate remedy at law, and the injury done and threatened is such that complaint will be wholly remediless unless the defendants and each of them be restrained from the enforcement of the act and of the order referred to. A preliminary injunction was sought and finally a decree was

prayed declaring the act creating the said Railroad Commission to be unconstitutional and void, and the order, attempted to be made under said act, unconstitutional and void in so far as it may affect the complainant.

The order of the Railroad Commission referred to in the complaint, and which is made a part of the complaint, will be found in full at page 182 of the record. We set out so much of the order as we deem material for the purpose of this argument, it being borne in mind that both this order and each and all of the exhibits were made a part of the complaint, and necessarily the facts therein set out are as much a part of the complaint as though alleged specifically in the body of the bill.

ORDER.

"The cause came on for hearing and investigation on the 4th day of November, 1907. At this hearing, and at all subsequent hearings the complainant was represented by Joseph N. Teal, its attorney, and the defendant was represented by W. W. Cotton, its attorney. A large amount of testimony was taken, and all of the issues presented and investigated very carefully.

After due investigation and consideration of all the facts presented, we have reached the conclusion and have determined that the class rates in issue in this proceeding now charged by the defendant company for the transportation of various commodities within this state are unjust and unreasonable, and should be reduced and find as follows:

First. That the defendant, The Oregon Railroad and Navigation Company is a cor-

poration duly organized and doing business under the laws of the State of Oregon, and is a public service corporation and a common carrier engaged in the transportation of passengers and property between points within the State of Oregon, and as such common carrier is subject to the provisions of the Act to Regulate Transportation and Commerce, etc., filed in the office of the Secretary of State of the State of Oregon, February 18, 1907; that a main line of the railway of the said defendant runs from the City of Portland, Multnomah County, Oregon, to the town of Huntington, in Baker County, in said state, and lies wholly within the State of Oregon.

Second. That the class rates now in effect under defendant's freight tariff effective January 1, No. L-525, O.R.C. No. 89, I. C. C. No. 1146, with supplements amendatory thereof, over and on said defendant company's main, branch, leased and otherwise controlled railroad lines within the state of Oregon, between the City of Portland and all points within said state on said lines of railroad east of the City of The Dalles in said state, are unjust and unreasonably high. Said tariff is based on existing Western Classification. That the defendant has established class rates between Portland and branch line points which generally are the same or lower for equal distance on the main line.

Third. That between the City of Portland, Oregon, and all points east of The Dalles, except where, under said tariff, the rates are now the same or less than are prescribed herein, the first-class rates now in effect under said tariff should be reduced by an amount equal to one-

sixth of the difference between twenty-five cents (the existing first class rate to The Dalles), and the existing first class rate to such point; and that all other class rates between Portland and points east of The Dalles, with the exception above noted, should be reduced and bear the same relation to the first class rate as is provided in the distance tariff of said defendant company, to-wit:

Classes	1	2	3	4	5	A	B	C	D	E
Per cent of first class	100	85	70	60	50	50	40	30	25	20

The rates on branch lines to be the same as on the main line for equal mileage. And that such rates are hereby determined to be just and reasonable rates for the transportation of the property and commodities covered by said tariff under said classes; and that present rates between Portland and any point in the State of Oregon under said tariff should not be exceeded on any class.

It is therefore ordered, considered and determined that the defendant company, The Oregon Railroad & Navigation Company shall cease and desist from charging any higher rates within this state for the transportation of merchandise and other commodities between the City of Portland and points on the defendant company's main, branch, leased or otherwise controlled railroad lines within the State of Oregon, covered by the class rates in said tariff No. L-525, O. R. C. No. 89, I. C. C. No. 1146, than the class rates prescribed in this order, and that said railroad company, in lieu of the rates herein ordered discontinued, shall substitute the following maximum rates;

Reduce first class rates (under present Western Classification) between Portland and

all points east of The Dalles (except where, under the existing tariff, the rates are now less than prescribed herein) by an amount equal to one-sixth of the difference between twenty-five cents (the existing first class rate to The Dalles) and the existing first class rate to such point, and reduce all other class rates between Portland and points east of The Dalles, with the exception above noted, so that they will bear the same relation to the first class rate as is provided in the distance tariff of said defendant railroad company, to-wit:

Classes	1	2	3	4	5	A	B	C	D	E
Per cent of first class	100	85*	70	60	50	50	40	30	25	20

The defendant shall apply such rates to the supplements to and reissues of the present Western Classification.

It is further ordered, considered and determined that the rates under the existing tariff shall not be exceeded on any class between any points covered by said tariff nor apply to or change any rate now in effect that is lower than the rates prescribed by this order; provided, the rates herein ordered may equal the present rates between Portland and The Dalles when the application of the formula herein prescribed would reduce the rates below the said present rates between Portland and The Dalles.

When the application of the formula produces a remainder of one-half cent or greater fraction the company shall be entitled to charge the whole cent, and when less than one-half cent the same shall be dropped.

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*Erroneously copied 35 in Record.

> The rates prescribed by the foregoing order shall be effective from and after twenty days after the service of a copy hereof on the defendants as required by law, and the defendant is given until twenty days after such service to prepare and file new tariffs in accordance with the provisions of this order."

The Railroad Commission Act of Oregon, as in effect at the time of bringing the suit, is set out in full, pages 111 to 160, both inclusive, of record. The controlling provisions of this act in so far as they may pertain to this controversy and considered in connection with the allegations of the complaint and as a part of it, are as follows:

It creates a Railroad Commission, to be composed of three persons elected by the people, but appointive until an election is held. Section 1 (Rec. 115).

The Commissioners shall be known collectively as "Railroad Commission of Oregon," and in that name may sue and be sued, etc. Section 7 (Rec. 117).

> "The term railroad, as used herein shall mean and embrace all corporations, companies * * that now, or may hereafter, own, operate by steam, electric or other motive power, manage or control, any railroad or interurban railroad, or part of a railroad or interurban railroad as a common carrier in this state, or cars or other equipment used thereon, or bridges, terminals, or side tracks, used in connection therewith, whether owned or operated under a contract, agreement or lease or otherwise. * * * The provisions of this act shall apply to the transportation of passengers and property, and to all railroad

companies, etc., that shall do business as common carriers upon or over any line of railroad within this state." Section 11 (Rec. 118).

Every railroad is required to furnish reasonably adequate service, equipment and facilities, and the charges made for any service rendered or to be rendered in the transportation of passengers or property or for any service in connection therewith, * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. Section 12 (Rec. 119).

Every railroad is required to print and file with the Commission a schedule of its rates and joint rates existing between all points in this state upon its lines, or any line controlled or operated by it. Section 13 (Rec. 119).

Changes in schedules are to be made only upon notice and filing of copies of new schedules with the Commission. Section 14.

> "It shall be unlawful for any railroad to charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property or for any service in connection therewith than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, and the rates, fares and charges named therein shall be the lawful rates, fares and charges until the same are changed as herein provided." Section 16 (Rec. 121).
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> "There shall be but one classification of freight in the state, which shall be uniform on all railroads." Section 20 (Rec. 121).

"All railroads shall, at all points of connection crossings or intersection with the roads of other railroads, unite therewith in establishing and maintaining suitable platforms and station houses for the convenience of passengers desiring to transfer from one road to the other; and for the transfer of passengers, baggage or freight, whenever the same shall be ordered by the railroad commission; and shall, when ordered by it, keep such depot or passenger house warmed, lighted and opened a reasonable time before the arrival and until after the departure, of all trains carrying passengers; and said railroads shall stop all trains at said depots for the transfer of passengers, baggage and freight when so ordered by the commission. Such railroads whose roads so connect or intersect shall, when ordered by the commission, so unite and connect the tracks by the several roads as to permit the transfer of cars from the track of one to that of the other. The expense of constructing and maintaining such station houses, platforms and track connections, shall be paid by such railroads in such proportions as may be fixed by the commission, in the event such railroads do not agree between themselves as to the apportionment thereof." Section 23 (Rec. 123).

"Upon complaint of any person, * * that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are in any respect unreasonable or unjustly discriminatory, or that any service is in-

adequate, the commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given, the commission may proceed to investigate the same as hereinafter provided. Before proceeding to make such investigation the commission shall give the railroad and the complainant ten days' notice of the time and place and when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. If upon such investigation the rate or rates, fares, charges or classifications, or any joint rate or rates, or any regulation, practice or service complained of shall be found to be unreasonable or unjustly discriminatory, or the service shall be found to be inadequate, the commission shall have power to fix and order substituted therefor such rate or rates, fares, charges or classifications as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future, and shall also have the power to make such orders respecting such regulations, practice or service as it shall have determined to be reasonable, and which shall be observed, followed, used and supplied in the future. * *

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Whenever the commission shall believe that any rate or charges may be unreasonable or unjustly discriminatory, or that any service is inadequate, and that an investigation relating thereto should be made, it may on its own motion investigate the same. If, after making

such investigation, the commission becomes satisfied that sufficient grounds exist to warrant a hearing ordered to determine whether the rate so investigated [is] unreasonable or unjustly discriminatory, or whether the service investigated is inadequate, it shall furnish the railroad or railroads interested a statement setting forth the rate or service investigated, which said statement shall be accompanied by a notice fixing a time and place for hearing on such rate or service, as the case may be. Notice may likewise be given to other parties in interest, and shall be given at least ten days in advance of any hearing, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint was filed with the commission relative to the matter investigated, pursuant to the provisions of this section, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

This section shall be construed to permit any railroad to make complaint with like effect as though made by any person, firm, corporation or association, mercantile, agricultural or manufacturing society, body politic or municipal organization. * * *" Section 28 (Rec. 129).

"Whenever, upon an investigation made under the provisions of this Act, the commission shall find any existing rate or rates, fares, charges, or classifications, or any joint rate or rates, or any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are unreasonable or unjustly discriminatory, or

any service is inadequate, it shall determine and by order fix a reasonable rate, fare, charge, classification, or joint rate to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory, or inadequate, as the case may be, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the railroad affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof. All railroads to which the order applies shall make such changes in their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares, or charges, or in any joint rate, or rates, without the approval of the commission. * *

The commission may, at any time, upon notice to the railroad, and after opportunity to be heard as provided in section 28, rescind, alter or amend any order fixing any rate or rates, fares, charges, or classification, or any other order made by the commission, and certified copies of the same shall be served and take effect as herein provided for original orders."

Provision is made for the ascertainment of joint routes and rates and their apportionment, in like manner. Section 30 (Rec. 133).

"All rates, fares, charges, classifications and joint rates fixed by the commission shall be in force and shall be *prima facie* lawful, and all regulations, practices, and service prescribed by the commission shall be in force and

shall be *prima facie* reasonable, until finally found otherwise in an action brought for that purpose pursuant to the provisions of sections 32, 33, 34 and 35 of this Act." Section 31 (Rec. 133).

"Any railroad * * interested in or affected by any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or service, being dissatisfied therewith, may commence a suit in the circuit court of Marion County against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates * * fixed in such order, are unlawful, or that any such regulation, practice or service prescribed or fixed in such order is unreasonable. * * The commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said suit shall be at issue and stand ready for trial upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the circuit court shall always be deemed open for the trial thereof, and the same shall be tried and determined as a suit in equity.

In all trials under this section, and sections 33, 34 and 35 thereof, the burden of proof (shall) be upon the plaintiff to show by clear and satisfactory evidence that the order of the commission complained of is unlawful, or unreasonable, as the case may be." Section 32 (Rec. 134).

"No injunction shall issue suspending or staying any order of the commission except

upon application to the circuit court or presiding judge thereof, notice to the commission, and hearing, and upon the giving of such bond or other security and upon such conditions as the court may require; and if such order of injunction suspends the order or requirement of the commission fixing rates, then the court shall require a bond with good and sufficient surety conditioned that the railroad or railroads applying for such injunction shall answer for all damages caused by the delay in the enforcement of the order of the commission and all penalties that would attach against the said railroad and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the commission had not been suspended; and such bond shall cover the periods transpiring from time of the issuance of any such injunction until the final determination of the question litigated. The said bond shall be executed in favor of the Railroad Commission of Oregon for the benefit of whom it may concern and shall be enforceable by said commission or any person interested in an appropriate proceeding. Any person paying charges found to be excessive shall have a claim for the excess, whether paid under protest or not, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such railroad, or such railroad and the sureties on such bond. Claims of persons for money collected in excess of the amount payable under the rate or rates established by the commission shall be assignable

in the same manner as any chose in action. No appeal to the Supreme Court shall stay the operation of any order of the commission unless the circuit or Supreme Court shall so direct, and unless the railroad so appealing shall give a bond with like conditions and terms as that given on granting injunctions suspending an order of the commission fixing rates." Section 33 (Rec. 134).

In order that the Court may be fully advised as to the exact condition of this act, it will be noted this section was amended prior to the rendition of the decree appealed from. Section 33 as amended is printed as an appendix to this brief.

"If, upon the trial of such suit, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or additional thereto, the court before proceeding to render judgment, unless the parties to such suit stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classification, joint rate or rates, regulation, practice, service or equipment complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

If the commission shall rescind its order complained of, the suit shall be dismissed; if it shall alter, modify or amend the same, such

altered, modified or amended order shall take the place of the original order complained of, and judgment or decree shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order." Section 34 (Rec. 135).

"Either party to said suit, within sixty days after the entry of the judgment or decree of the circuit court, may appeal to the Supreme Court. Where an appeal is taken the cause shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar, but shall have precedence over civil causes of a different nature pending in said court." Section 35 (Rec. 135).

"The commission shall have power, and it is hereby made its duty to investigate all freight rates on interstate traffic on railroads in this state, and when the same are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the Interstate Commerce Commission, the commission shall present the facts to the railroad, with a request to make such changes as the commission may advise, and if such changes are not made within a reasonable time the commission shall apply by petition to the Interstate Commerce Commission for relief. All freight tariffs issued by any such railroad relating to interstate traffic in this State shall be

filed in the office of the commission within thirty days after the passage and publication of this act and all such tariffs thereafter issued shall be filed with the commission when issued." Section 47 (Rec. 140).

"If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this Act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case; provided, that any recovery as in this section provided, shall in no manner affect a recovery by the State of the penalty prescribed for such violation * *." Section 51 (Rec. 141).

"Any officer, agent or employe of any railroad who shall fail or willfully refuse to fill out and return any blanks as required by this Act, or shall fail or refuse to answer any questions therein propounded, or shall knowingly or willfully give a false answer to any such question, or shall evade the answer to any such question, where the fact inquired of is within his knowledge, or who shall, upon proper demand, fail or willfully refuse to exhibit to the commission or any commissioner, or any person authorized to examine the same, any book, paper or account of such railroad, which is in his possession or under his control, shall be deemed guilty of a misdemeanor, and upon

conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each such offense; and a penalty of not less than five hundred dollars nor more than one thousand dollars, shall be recovered from the railroad for each such offense when such officer, agent or employee acted in obedience to the direction, instruction or request of such railroad or any general officer thereof." Section 52 (Rec. 141).

"If any railroad shall violate any provision of this act, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement, order made by the commission, or any judgment or decree made by any court upon its application, for every such violation, failure or refusal, such railroad shall forfeit and pay into the State treasury a sum of not less than one hundred dollars, nor more than ten thousand dollars, for such offense. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any railroad, acting within the scope of his employment, shall in every case be deemed to be the act, omission or failure of such railroad.

All penalties, fines or forfeitures, or other sums collected or paid, under the provisions of this act, shall be paid into the general fund of the State treasury, except where it is provided the same shall be paid to the aggrieved party." Section 58 (Rec. 142).

"The commission shall have power when deemed by it necessary to prevent injury to the business or interests of the people or railroads of this State in consequence of interstate rate wars, or in case of any other emergency to be judged of by the commission to temporarily alter, amend, or with the consent of the railroad company concerned, suspend any existing passenger rates, freight rates, schedules and orders of any railroad or part of railroad in this State. Such rates so made by the commission shall apply on one or more of the railroads in this State or any portion thereof as may be directed by the commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the commission." Section 54 (Rec. 142).

"Whenever, after hearing and investigation as provided by this act, the commission shall find that any charge, regulation, or practice affecting the transportation of passengers or property, or any service in connection therewith, not hereinbefore specifically designated, is unreasonable or unjustly discriminatory, it shall have the power to regulate the same as provided in sections 28 and 30 of this act." Section 55 (Rec. 143).

"The commission shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein, or by the officers, agents, or employes thereof, or by any person operating a railroad, and shall have the power, and it shall be its duty, to enforce the provisions of this act as well as all other laws relating to railroads and report all violations thereof to the Attorney-General; upon the request of the commission

it shall be the duty of the Attorney-General or the prosecuting attorney of the proper county to aid in any investigation, hearing, or trial had under the provisions of this act, and to institute and prosecute all necessary actions or proceedings for the enforcement of this act or the recovery of penalties payable to the state, and of all other laws of this state relating to railroads, and for the punishment of all violations thereof. Any forfeiture or penalty herein provided shall be recovered by an action brought thereon in the name of the State of Oregon in any court of appropriate jurisdiction." * * * Section 57 (Rec. 143).

"A substantial compliance with the requirements of this act shall be sufficient to give effect to all the rules, orders, acts and regulations of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. The provisions of this act shall be liberally construed with a view to the public welfare, efficient transportation facilities, and substantial justice between shippers and passengers and railroads." Section 59 (Rec. 144).

"This act shall not have the effect to release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may have arisen or which may hereafter arise under any law of this state; and all penalties and forfeiture accruing under this act shall be cumulative and a suit for, and recovery of one, shall not be a bar to the recovery of any other penalty." Section 60 (Rec. 144).

It is impracticable and unnecessary to reprint the various tariffs forming part of the complaint, but they will be referred to on argument.

DEMURRERS TO THE BILL.

To this bill of complaint defendants interposed demurrers. (Rec. 34 to 37). The general demurrer was in usual form for that it appears upon the face of the bill (1) that the court has no jurisdiction of the subject matter of the controversy; (2) that complainant is not entitled to the relief prayed, against any of the defendants; (3) that it does not state a case that entitles it to the relief sought, and (4) that complainant has an adequate remedy at law.

A separate demurrer was filed to paragraphs VI to XIII inclusive, and to each of them, and XV to XXVIII inclusive, upon the grounds (1) that it appears from the facts set forth in each of said paragraphs and in all of them, that complainant is not entitled to the relief or any part thereof, prayed for from or against these defendants, or any of the defendants, and (2) that the facts as set forth in each of said paragraphs and all of them, do not state a cause of suit, or any part of a cause of suit, against these defendants, or any of the defendants.

The demurrer was sustained (except upon the question of jurisdiction) and the motion of complainant for a preliminary injunction was denied. The restraining order, however, was continued in force pending an application by complainant for leave to amend its bill of complaint. (Rec. 38).

ALLEGATIONS OF THE AMENDMENT TO THE BILL OF COMPLAINT.

An amendment to the bill of complaint was thereafter filed. (Rec. 77).

Paragraph II of said amendment (Rec. 77), in substance alleges that of the freight carried on complainant's lines in Oregon from Portland east of The Dalles under class rates established by tariff No. L-525, at least 40 per cent originates out of Oregon, has been, and will be shipped from Portland to points east of The Dalles in the same packages in which it was originally shipped from the eastern point of origin to Portland, and without coming to rest within Oregon, and without becoming part of the traffic of the state of Oregon; and at least 20 per cent of the freight carried and to be carried, over complainant's lines in Oregon east of The Dalles, under said tariff, has been and will be shipped from Portland to such points by carriers and persons bringing the same to Portland from points without Oregon, with the intention of immediately shipping the same over complainant's lines from Portland to points in Oregon east of The Dalles, and the same has been, and will be so brought into Oregon and so shipped over the lines of complainant from Portland to Eastern Oregon points, and that the class rates established by the order of the commission apply to all of the freight mentioned in the amendment.

Paragraph III (Rec. 78) alleges that Section 1 of the commission act requires the charges made for the transportation of property shall be reasonable and just, and that this provision is the only limitation fixed by

the state or by any legislation thereof upon the right of complainant to make charges for its service as a common carrier; that complainant is the owner and operator of the railroads owned by it, is entitled to the possession, management and beneficial use thereof, and is authorized to establish rates for the transportation of freight thereover, subject only to the provision that such rates shall be just and reasonable.

The substance of Sections 30, 48, 31 and 32 of the railroad commission act is then set out. (The sections have been previously quoted in this statement.) It is further alleged that the rates fixed by tariff L-525 from Portland to points in Oregon east of The Dalles are, have been and will be for a period of more than three years hence low, just and reasonable rates for transportation between said places, and the rates prescribed by the railroad commission's order have been and will be for more than three years hence, unjust and unreasonable for the transportation of freight now carried under the class rates established and fixed by tariff L-525 from Portland to said points in Oregon.

That by the fourteenth amendment to the constitution of the United States complainant has a right to a judicial investigation in a court by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy of the question as to the reasonableness of the rates so fixed and established by complainant and of the reasonableness of the rates fixed and established by the commission. By Section 1 of Article VII of the constitution

of Oregon all the judicial power of the state is vested in a Circuit Court and County Courts; that the railroad commission is not one of said courts and cannot and does not exercise any judicial powers or conduct any judicial investigation.

The attempt of the commission by said order to set aside and annul the rates established by complainant and the establishment of the rates prescribed by said order against the will of complainant is *pro tanto* the taking of the property of the complainant and depriving it thereof without due process of law in violation of the fourteenth amendment to the constitution of the United States, and the making of said order of the commission was *pro tanto* a taking and depriving complainant of its property without due process of law in violation of said Article XIV, and is thereby void and of no effect.

These allegations were followed by the usual prayer.

DEMURRERS TO THE AMENDED BILL.

A demurrer to the complaint and demurrers to portions of the bill of complaint as amended were interposed by the defendants (Rec. 81 to 85 inclusive), which were in substance and form the same as those interposed to the original complaint. (Rec. 81, 85).

The demurrers were sustained, and thereafter the bill of complaint and amended complaint were dismissed and the restraining order vacated (Rec. 89).

It will be noted that by the amendment to the complaint the question was attempted to be presented as to whether goods shipped into Portland from outside the state in original packages and sooner or later

shipped out again to the interior of the state, in the same unbroken packages, would constitute interstate commerce. The court held that, if an attempt was made to exact the state rate upon interstate traffic such attempt might be enjoined in any court of competent jurisdiction, but that these special cases must necessarily be determined as they arose, as it was impossible to determine in advance what specific commodities and the transportation thereof constitute interstate and what intrastate commerce.

BILL OF INTERVENTION OF W. S. SMALLWOOD.

Thereafter this question arose directly when W. S. Smallwood on leave filed his bill of intervention against complainant to secure an order directing the payment of certain claims growing out of alleged overcharges. The petition will be found in the Record 90 to 95 inclusive. Three claims were presented. The first claim arose on a shipment from Portland, Oregon, to La Grande, Oregon. The facts are as follows:

> "X. Goods, wares and merchandise purchased by Allen & Lewis in states other than Oregon to become a part of its common stock in trade at Portland, Oregon, and were billed and transported to the said point of destination, to-wit: Portland, Oregon, by various means of carriage both water and rail, and on arrival at said city said Allen & Lewis surrendered the bills of lading therefor, paying the freight thereon, took possession of the same and same were taken in original packages by the said Allen & Lewis to its warerooms and became a part of the common stock in trade carried by it for sale in said City of Portland,

Oregon, and there held an indefinite period for sale, and were thereafter sold from the said stock in said city in the original packages, as received by the said Allen & Lewis, and transported to La Grande, Oregon, in said packages by the complainant." (Rec. 92).

The second claim was based upon the following facts:

"XII. Said sugar so shipped was a portion of a lot of sugar purchased in California by said Allen & Lewis to become a part of its common stock in trade at Portland, Oregon, and was billed and transported to its said point of destination, to-wit: Portland, Oregon, by water by the Richardson steamship line, an independent water carrier not under common control or management by or with the complainant and having no joint tariffs, through rates, arrangements, or connections with the complainant for continuous carriage or shipment or otherwise. On arrival at said city said Allen & Lewis surrendered the bills of lading therefor, paid the freight thereon, took possession of the same and the same was taken in original packages by said Allen & Lewis to its store and warehouse and became a part of its common stock in trade carried by it for sale and there held an indefinite period for sale and was thereafter shipped from its said stock in Portland, Oregon, in the original packages as received by said Allen & Lewis and transported to La Grande, Oregon, in said packages by the complainant and delivered to said Oliver, who held the same for the account of and subject to the order of said Allen & Lewis." (Rec. 93).

The third claim was based upon the following facts:

"XIV. Said sugar was purchased in the State of California by said Lang & Co. for future sale by it at Portland, Oregon, with the intention of shipping it from Portland to some point within the State of Oregon. Said sugar was sold and billed to Lang & Co. and transported to Portland, Oregon, its point of destination, by the Richardson steamship line, an independent water carrier not under common control or management by or with the complainant and having no joint tariffs, through rates, arrangements or connections with the complainant for continuous carriage or shipment or otherwise. On arrival of the sugar at said City of Portland, said Lang & Co. surrendered its bill of lading therefor, paid the freight charges thereon and took possession of the same in the original packages as shipped from San Francisco. Thereupon said sugar was insured against loss by fire by Lang & Co. in its own name and as owner thereof while in warehouse at Portland, Oregon, and was held by said Lang & Co. in warehouse until sold and cars supplied for loading and the same was sold after its arrival at Portland, Oregon, to said Baker City Grocery Company by Lang & Co. at Portland, Oregon, reshipped from said city by Lang & Co. to said Baker City Grocery Company at Baker City, Oregon, over the lines of the complainant under a bill of lading issued to said Lang & Co. therefor, and was transported by complainant under said bill of lading in the original packages to Baker City, Oregon, and there delivered by complainant to said Baker City Grocery Company, the

consignee named in said bill of lading, and the charges collected thereon from said Baker City Grocery Company for transportating the same from Portland to Baker City.

"Intervenor alleges that each and all of said shipments was and were intrastate shipments and as such were subject to be transported under the rates prescribed by the railroad commission of Oregon, as in its order hereinbefore referred to and set out." (Rec. 94).

No answer or other pleading was filed by appellant and the petition was heard on the facts as alleged. The court held that the shipments in question were intrastate commerce and directed payment of the overcharges. (Rec. 96 to 101 inclusive).

Thereafter complainant filed its petition for appeal. (Rec. 101).

ASSIGNMENT OF ERRORS.

The first five assignments are in usual form, that the court erred in its order sustaining the demurrers, general and to specific portions of the original and amended bills of complaint. The sixth assignment is that the court erred in holding the order of the commission was not a regulation of interstate commerce or repugnant to the commerce clause of the constitution. The remaining assignments are:

"7. That the said court erred in holding and deciding that the fines and penalties prescribed by the act of the legislature of Oregon, establishing the said railroad commission of Oregon, and prescribing certain fines and penalties for the violation of the provisions of

said act, were not exorbitant or drastic, and did not deprive the complainant of the equal protection of the laws and subject its property to be taken without due process of law, in violation and contravention of the constitution of the United States.

"8. That the said court erred in holding and deciding that the order of the railroad commission of Oregon sought to be enjoined did not prevent the complainant from making fair net earnings on the services involved, and did not deprive the complainant of its property without due process of law.

"9. Said court erred in holding and deciding that the rates established by the order of the railroad commission of Oregon sought to be enjoined are reasonable, just and fair.

"10. That the said court erred in holding and deciding that the act of the legislature of Oregon establishing the railroad commission of Oregon and prescribing its duties, did not confer upon the said commission legislative, executive and judicial functions in violation of the constitution of the State of Oregon.

"11. That the said court erred in signing and entering the judgment and decree in favor of the defendants and against the complainant, dismissing this cause and suit, and giving judgment in favor of the defendants and against the complainant for costs." (Rec. 103 and 104).

ARGUMENT

THE QUESTION INVOLVED.

Under the bill of complaint, as amended, the following questions are presented and sought to be presented:

1. That the act creating the railroad commission of Oregon is, and the powers granted thereby, are violative of the constitution of the state of Oregon, in that the act attempts to confer executive, legislative and judicial powers upon said commission.

2. That the act is in violation of the constitution of the United States and particularly Article XIV of the amendments thereof, because of the excessive penalties imposed for its violation, thus depriving appellant of the equal protection of the laws, and that appellant's property is liable to be taken without due process of law.

3. That no adequate remedy for review of the orders of the commission is provided by law and appellant may be deprived of its property without due process of law in violation of the fourteenth amendment.

4. That the commission act and order of the railroad commission of Oregon interfere with and regulate interstate commerce.

5. That if enforced the order will prevent appellant from making fair net earnings on its investment and is *pro tanto* a taking and depriving the appellant of its property against its will and without due process of law.

6. That the rates established by the order are unreasonably low.

7. That appellant has a right under the fourteenth amendment to a judicial investigation in a court by due process of law, as to the reasonableness of the rates as established by it and as established by the railroad commission of Oregon under its order.

Certain of these questions will be determined by the court under the law; others as presented are mixed

tions of law and fact, and others presumptively deal with questions of fact.

Whether the bill of complaint states facts necessary to maintain the issues attempted to be presented, or presents any real issues of fact, will be determined by an examination of the bill.

APPELLEES' CONTENTION.

Briefly stated, the contention of appellees, as representing the state of Oregon, is substantially as follows:

A. The power of the state in all matters affecting intrastate commerce is supreme, subject only to constitutional guaranties for the protection of property rights.

B. The state may pursue such constitutional methods as it may desire to effectuate this control. It may establish rates and regulations to be charged and enforced by common carriers in connection with intrastate traffic by the direct action of the legislature or through an administrative body.

C. The act of the legislative assembly creating the railroad commission of Oregon is and the powers thereby granted are constitutional.

D. The findings and conclusion of the commission in determining and fixing a reasonable rate to be charged in the future for the transportation of freight are not subject to review by the courts, except upon constitutional grounds.

E. In passing upon an order of the commission fixing reasonable rates to be charged in the future, a court will not substitute its judgment for that of the commission as to the reasonableness of the rate in the

ordinary meaning of the word, but as to whether the rates fixed are unreasonable from a constitutional standpoint, i. e., confiscatory.

F. Appellant should pursue its remedy in the state courts before resorting to the injunctive process of the federal courts.

G. Under the law all presumptions are in favor of an order made by a duly authorized administrative tribunal.

H. No issuable fact is presented by general allegations such as "the rates fixed are unreasonably low," "that a large loss in net revenue will result from the enforcement of the order," and the like, nor does a demurrer admit the truth of such allegations. To tender issues of fact a complaint must contain full, accurate, clear and distinct statements of ultimate facts.

I. The interference with interstate commerce that is condemned is a direct interference.

J. The statute and order regulate and attempt to regulate intrastate commerce only and do not unduly or unlawfully interfere with interstate commerce.

DOES THE ORDER COMPLAINED OF AFFECT INTERSTATE COMMERCE?

There can be no disguising the fact that the alleged interference with interstate commerce is the real gravamen of the complaint. The bill is not framed upon the theory that any discrimination against interstate commerce results from the order.

Reduced to a sentence, the basis of the claim lies in the fact that in some instances local rates over the lines of the appellant, from Portland to points in Oregon and

elsewhere, are used in arriving at a through interstate rate. This is due to the tariff rules of the appellant, which to some extent are induced by the fact that Portland is a rail and water terminal. Based on this fact it is alleged that changes in local rates affect through interstate rates, and thus such change or order making them is an undue interference with interstate commerce.

In other words, that intrastate rates in Oregon can never be changed without the consent of the railroad, because a through interstate rate may base on some point within the state.

Before discussing the facts as alleged in the bill, we will first direct attention to the power of the state over domestic commerce.

THE STATE HAS EXCLUSIVE JURISDICTION OVER ITS INTERNAL COMMERCE.

It must be conceded that the power of the state to regulate intrastate commerce is as broad as the power of Congress to regulate interstate commerce. The state cannot regulate interstate commerce, and Congress cannot regulate intrastate commerce.

This is the principle underlying *Howard v. Illinois Central R. Co.*, 207 U. S. 468.

Each sovereignty has the right to exercise its authority over the commerce subject to its jurisdiction. At times there is necessarily some interference one with another, but if such result is merely an indirect or incidental interference with the subject matter under control of the other, it is not a violation of the constitution. The act is legal unless the sovereign enacting it has, in

so doing, asserted authority or jurisdiction over the matter not subject to its jurisdiction.

The interference with interstate commerce that is forbidden is a direct interference. In most of this class of cases the point has been made that the act complained of was an interference with interstate commerce, but it has been rarely sustained. The regulation of domestic commerce is as exclusively a state function as the regulation of interstate commerce is a federal function.

Milnor v. New Jersey R. Co., 17 Fed. Cases, 63.

Ex Parte Koehler, 30 Fed. 867.

Allen & Lewis v. O. R. & N. Co., 106 Fed. 269.

St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 117.

Woodside v. Tonopah & G. R. Co., 184 Fed. 80.

Louisville & N. R. Co. v. Siler, 186 Fed. 176.

In re Arkansas Rate Cases, 187 Fed. 200.

Southern Pacific Co. et al. v. Campbell et al., — Fed. —

Gibbons v. Ogden, 9 Wheat. 195.

United States v. Chicago etc. R. Co., 149 Fed. 486.

Ex Parte Plessy, 45 La. Ann. 80, 87.

Sands v. Manistee R. Imp. Co., 123 U. S. 28.

Willamette Bridge Co. v. Hatch, 125 U. S. 1.

Wabash, St. L. & P. Co. v. Illinois, 118 U. S. 557.

Luxton v. North Bridge Co., 153 U. S. 525.

Geer v. Connecticut, 161 U. S. 519, 531.

Addyston Pipe & S. Co. v. U. S., 175 U. S. 211, 247.

Erie Railroad Company v. Purdy, 185 U. S. 148, 150.

Atlantic C. L. v. N. C. Com., 206 U. S. 1.

Howard v. Ill. Central Ry. Co., 207 U. S. 463.

People v. Butler Street Foundry etc. Co., 201 Ill. 236, 250.

Attorney General v. Old Colony R. Co., 160 Mass. 62.

Chicago etc. Ry. Co. v. R. R. Com., 178 Ind. 469.

Central Trust Co. v. R. R. Co., 101 N. Y. Sup. 887.

Larabee v. Mo. Pac. R. Co., 74 Kans. 808.

State v. Jack, 69 Kans. 887.

Beardsley v. New York, L. E. & W. R. Co., 15 App. Div. (N. Y.) 251.

Purdy v. Erie R. Co., 162 N. Y. 42; appeal dismissed, 185 U. S. 148.

New Jersey Fruit Exc. v. R. R. Co., 2 Inters. Com. Rep. 84, 86; 2 I. C. C. Rep. 142.

Hastings etc. Co. v. R. R. Co., 11 I. C. C. Rep. 675, 682.

Farmers' etc. Club v. R. R. Co., 12 I. C. C. Rep. 351, 355.

Railroads are subject as to their state business to state regulations, which may be exerted directly by the legislative authority or by administrative bodies endowed with power to that end.

Calvert, Regulation of Commerce, p. 75.

Beale & Wyman, Railroad Rates, Section 1307.

Noyes, American Railroad Rates, 206.

Cooke on the Commerce Clause of the Federal Constitution, Section 28.

Chicago etc. R. Co. v. Iowa, 94 U. S. 155.

Railroad Commission Cases, 116 U. S. 307.

Wabash, St. Louis, P. R. R. Co. v. Illinois, 118 U. S. 557.

Georgia R. etc. Co. v. Smith, 128 U. S. 174.

C. M. & St. P. R. Co. v. Minnesota, 134 U. S. 418.

Chicago etc. Co. v. Wellman, 143 U. S. 339.

Covington etc. Bridge Co. v. Kentucky, 154 U. S. 204.

Reagan v. Merc. Trust Co., 154 U. S. 413.

St. Louis v. Gill, 156 U. S. 649.

Smyth v. Ames, 169 U. S. 466.

Dinsmore v. Southern Express Co., 183 U. S. 115.

New Mexico ex rel. McLean v. Denver & Rio Grande R. Co., 203 U. S. 38.

Ware & Leland v. Mobile Co., 209 U. S. 405.

Gulf, Col. & S. F. Ry. Co. v. Texas, 204 U. S. 403.

Atlantic Coast Line v. N. C. Corp. Com., 206 U. S. 1.

General Oil Co. v. Crain, 209 U. S. 211.

State v. Mo. Pac. Ry. Co., 76 Kans. 467; affirmed 216 U. S. 262.

Southern Railway Co. v. Hunt, 42 Ind. App. 90.

Commissioner of Railroads v. Wabash R. Co., 128 Mich. 669; affirmed 126 Mich. 118.

In *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, at page 393, the court says:

> "Passing from the question of jurisdiction of the act itself, there can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. *Stone v. Farmers' Loan & Trust Co.* (Railroad Commission Cases), 116 U. S. 307. No valid objection, therefore, can be made on account of the general features of this act; those by which the state has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the state."

In *Smyth v. Ames, supra*, at page 521, the court says:

> "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways between points wholly within the limits of a state is a subject primarily within the control of that state."

In *Atlantic C. L. R. Co. v. North Carolina Corporation Co., supra,* Mr. Justice White, speaking for the court, says (page 19):

> "The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end is not and could not be successfully questioned in view of the long line of authorities sustaining the doctrine."

Mr. Justice Day, in *New Mexico ex rel. McLean v. Denver & Rio Grande R. Co., supra,* at page 49, said for the court:

> "It has been too frequently decided by this court to require the re-statement of the decisions, that the exclusive power to regulate interstate commerce is vested by the constitution in Congress, and that other laws which undertake to regulate such commerce or impose burdens upon it are invalid. This doctrine has been reaffirmed and announced in cases decided as recently as the last term of this court. *Houston & T. C. R. Co. v. Mayes,* 201 U. S. 321; *McNeill v. Southern R. Co.,* 202 U. S. 543. While this is true, it is equally well settled that a state or a territory, for the same reasons, in the exercise of the police power, may make rules and regulations not conflicting with the legislation of Congress upon the same subject, and not amounting to regulations of interstate commerce. It will only be necessary to refer to a few of the many cases decided

in this court holding valid enactments of legislatures having for their object the protection, welfare, and safety of the people, although such laws may have an effect upon interstate commerce. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 685; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477. The principle decided in these cases is that a state or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce."

Mr. Justice White (with him concurring Chief Justice Fuller, and Justices Peckham and Holmes), said in 193 U. S. 394 in the *Northern Securities* case:

"Where an authority is exerted by a state which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the states if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore con-

stitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity, between the manifestation of the power and the resulting burden.*"

In the case of *Oklahoma v. A. T. & S. F. R. Co.* 31 Sup. Ct. Rep. 484, 220 U. S. 277, the Supreme Court again passed upon the question of the power of a state to regulate intrastate rates. Prior to the admission of Oklahoma as a state Congress granted to the Southern Kansas Railway Co. of Kansas the right to construct a railroad line through the Indian Territory. The act forbade the company to charge the inhabitants of the territory a greater rate of freight than the rate authorized by the laws of the state of Kansas for services or transportation of the same kind, and fixed the passenger rates at not to exceed three cents per mile. The law containing this proviso was to be effective "until a state government or governments shall exist in said territory, within the limits of which said railway or a part thereof shall be located; and then such state government or governments shall be authorized to fix and regulate the cos

of transportation of persons and freights within their respective limits by said railway." Congress reserved the right to fix and regulate the transportation between the states. The grant was accepted by the railway, which is now a part of the Atchison, Topeka & Santa Fe. The state brought a suit, claiming that the railroad had continuously violated the condition, and asked that the grant given this line be decreed to be in the state of Oklahoma *as cestui que trust*, and that the railway be enjoined and restrained from charging a greater rate of freight than that authorized by the laws of Kansas, etc. In discussing it the court said, at page 435 of the Reports: "While the *territorial* conditions lasted, the governmental power of Congress over the territory and its inhabitants was exclusive," etc. The court then points out that the regulations prescribed by the act were to exist until a state government was created, and then the state government should have the authority to fix and regulate fares and freight. The court then held (page 435) that when Oklahoma was organized as a state and admitted into the Union "on an equal footing with the original states," the federal act necessarily ceased to be in force in the state and the whole subject of said rates in domestic or local business passed under the full control of the state in its corporate capacity, subject, of course, to the fundamental condition that it should authorize only such rates as were legal and not inconsistent with the constitutional rights of the railway company.

Again, in the case of *Oklahoma v. Chicago, Rock Island & Pacific Railway Co.*, 31 Sup. Ct. Rep. 442, 220 U. S. 302, the court held (page 443):

> "Whether any particular rates charged by the railroad company after Oklahoma became a state were illegal, as being unreasonable and purely arbitrary, depended upon the laws of that state touching the matter, or upon the provision of the federal constitution, protecting property against undue exactions without due process of law."

It would be conceded a state law regulating a federal subject would be void, and a federal law regulating a subject of state jurisdiction would also be void.

Trade Mark Cases, 100 U. S. 82.

Ill. Cent. R. Co. v. McKendree, 203 U. S. 514.

Howard v. Ill. Cent. R. Co., 207 U. S. 463.

In the case last cited Mr. Chief Justice White in discussing this point said (page 502):

> "It is apparent that if the contention were well founded, it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the constitution endures."

While under the constitution Congress cannot control or regulate intrastate commerce, it has shown unmistakably that it has no intention so to do, but on the contrary rejected a proposed amendment to the law which it was thought might be construed as extending

the powers of the federal commission over matters of domestic concern, and in the sections relating to review by the courts in the act to regulate commerce, made additional provisions for procedure where acts of states or those of state officers are involved.

The first section of the original act to regulate commerce had and now has this provision:

> "*Provided, however,* that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped from or to any state or territory as aforesaid."

In the sixty-first Congress, second session, a substitute amendment was recommended by the House Committee to H. R. 17536, being the bill to amend the act to regulate commerce. (Report No. 928).

The amended bill omitted the provision quoted above. This omission immediately met with opposition on the grounds that it might make the entire bill unconstitutional under the doctrine in the employers' liability case, and that it might be used as a basis for an unwarranted interference with state commerce and matters of state concern.

The proposed amendment was rejected and the original proviso restored by the House of Representatives without objection. (Vol. 45, Cong. Rec., No. 112, p. 5650).

By Section 17 of the act creating the Commerce Court and other additional provisions, Congress provided a special procedure where injunctions are sought

suspending or restraining acts done or orders made by state authority, and required the same to be heard by three judges.

ACTION OF INTERSTATE COMMERCE COMMISSION WHERE STATE RATES WERE INVOLVED.

As evidencing the universal acceptance of the doctrine enunciated in the foregoing cases, the action of the Interstate Commerce Commission when called upon to take action involving intrastate rates, is illuminating.

The commission has repeatedly refused to take jurisdiction over state rates even where it was alleged the rates touched upon or interfered with interstate commerce.

The federal government had and could have no authority over transportation which began and ended in a particular state.

Baer Bros. Merc. Co. v. Mo. Pac. Co., 18 I. C. C. Rep. 329, 333.

Hussey v. C. R. I. & P. Ry. Co., 18 I. C. C. Rep. 366.

Haines v. C. R. I. & P. Ry. Co., 13 I. C. C. Rep. 214.

Chandler Cotton Oil Co. v. Fort Smith & West. R. Co., 18 I. C. C. Rep. 478.

Morgan v. M. K. & T. Ry. Co., 12 I. C. C. Rep. 525, 528.

Montgomery Freight Bureau v. Western Ry. of Ala., 14 I. C. C. Rep. 150.

Marshall Oil Co. v. C. & N. W. R. Co., 14 I. C. C. Rep. 210.

Lincoln Com. Club v. C. B. I. & P. R. Co., 18 I. C. C. Rep. 819.

In *Saunders & Co. v. Southern Express Co.*, 18 I. C. C. Rep. 415, 422, the commission said:

"While we have full authority, upon certain principles and within certain limits definitely fixed in the amended act, to deal with interstate rates, it is expressly provided in Section 1:

" 'That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid.'

"This language seems to have but one meaning, and that is, that, although the Congress constitutionally may give and in fact has given to the national commission authority to control and regulate the rates to be demanded and accepted by interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely state traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reasonably clear that this commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order the purpose of which is directly or indirectly to affect the rates imposed upon the defendant by the order of the Alabama commission."

In the case of *Wells-Higman Co. v. Grand Rap* & *Indiana Railway Co. et al.*, 19 I. C. C. Rep. 487, complaint was filed with the Interstate Commerce Co mission respecting rates charged on a shipment fr Metropolis, Illinois, to Chicago, Illinois, reconsigned Lawton, Michigan. Reconsigning instructions we given to the carrier not participating in the origi movement. It was held that two separate movem resulted, the first intrastate and the second interst The carriers participating in the interstate move were not made parties defendant. The complaint w dismissed as no overcharge was shown for transporta within the jurisdiction of the commission.

In discussing the facts in the case, the commis held (page 490):

> "The contract entered into with the Illinois Central for the intrastate transportation to Chicago, care of Pere Marquette, at Riverdale, was duly discharged before the interstate movement to Lawton commenced,"

citing *Gulf, Colorado & Santa Fe R. R. Co. v. Te* 204 U. S. 403. The commission also cited *Coe v. Er* 116 U. S. 525, which case fixes the time when dome commerce becomes interstate commerce. According they found

> "two separate and distinct movements, therefore, comprise this transportation from Metropolis to Lawton—an intrastate movement from Metropolis to Chicago and an interstate movement from Chicago to Lawton. Over the intrastate movement we have no jurisdiction."

Carriers have the right to advance local charges respective of the through rate under control of In

state Commerce Commission. If an order required through rate should not exceed sum of locals, they could advance locals and thus defeat order. The only way to overcome this would be for commission to fix the through rate. The commission would have no control over the local rates.

Mich. Buggy Co. v. G. R. & I. Ry Co., 15 I. C. C. Rep. 297.

As to state control over rates even where interstate rates are involved, see *Kurtz v. Penn. Co.*, 16 I. C. C. Rep. 410.

In *Howard v. Ill. Cent. R. R. Co.*, 207 U. S. 463, 502, the court, *inter alia*, held that a carrier by engaging in interstate business does not thereby submit all its business affairs to the regulating powers of Congress.

In answer to the argument that a carrier which subjects itself to congressional control cannot be heard to complain of such regulations the court states (page 502):

> "It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which can not be availed of except upon such conditions as Congress may prescribe, even although the condi-

tions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

This opinion is by a divided court, Mr. Justice Moody, Harlan, McKenna and Holmes dissenting. In his dissenting opinion, Mr. Justice Moody makes this significant statement (page 505):

> "At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the states, and that I understand that to be the opinion of every member of the Court."

REMOTE OR INDIRECT INTERFERENCE WITH INTERSTATE COMMERCE.

The interference with interstate commerce that is subject to condemnation is direct, not that which is remote or indirect.

Munn v. Illinois, 94 U. S. 113.

Stone v. Farmers, etc. Trust Co., 116 U. S. 307.

Wabash, St. L. & P. R. R. Co. v. Illinois, 118 U. S. 557.

Budd v. New York, 143 U. S. 517.

Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204.

N. Y. L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 439.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677.

W. U. Tel Co. v. James, 162 U. S. 650.

Hennington v. Georgia, 163 U. S. 299.

Chicago, etc., R. Co. v. Solan, 169 U. S. 133.

Lake Shore, etc., R. Co. v Ohio, 173 U. S. 285.

Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287.

Louisville, etc., R. Co. v. Kentucky, 183 U. S. 503.

Houston Central Ry. Co. v. Mayes, 201 U. S. 321.

McNeill v. Southern Ry. Co., 202 U. S. 543.

Alabama, etc., R. Co. v. Commission, 203 U. S. 496.

Gulf, Colorado & Santa Fe R. Co. v. Texas, 204 U. S. 403.

Ware & Leland v. Mobile Co., 209 U. S. 405.

New York v. Hesterburg, 211 U. S. 31.

Missouri P. Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612.

In *Louisville and Nashville Railroad v. Commonwealth of Kentucky*, 183 U. S. 503, at page 518 the Court *inter alia*, says:

> "It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of the state."

In *Alabama and Vicksburg Railway v. Mississippi Railroad Commission*, 203 U. S. 496, the state railroad commission required the railroad to put into effect a freight rate on grain and grain products from Vicksburg to Meridan. It was contended that such order directly interfered with interstate commerce. The Court in passing upon this point (page 500), said:

> "While it may be true that a local railway's share of an interstate rate may not be a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate, yet, whenever, in the guise or pretense of a rebilling rate, some merchants are given a low local rate, the commission is justified in making that rate the rate for all."

In the case of *Missouri Pacific Railroad v. Larabee Flour Mills Company*, 211 U. S. 612, the state authorities had made an order compelling the railroad company to resume the making of transfer of cars between the lines of the Atchison, Topeka and Santa Fe Railroad Company, and the mill elevators of plaintiff situated in the town of Stafford. The order was

generally applied to all shippers. It appeared that about three-fifths of the flour shipped by the milling company was interstate commerce. The railroad company objected on the ground that the order was an unconstitutional interference with interstate commerce by the state authorities. The Court rejected the contention, and held the order to be valid. At page 620 of the opinion the Court uses this language:

> "The roads are, therefore, engaged in both interstate commerce and that within the state. In the former, they are subject to the regulation of Congress; in the latter, to that of the state; and, to enforce the proper relation between Congress and the state, the full control of each over the commerce subject to its dominion must be preserved."

In *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 209, in speaking of the relative domains for state and federal activities, Mr. Justice Brown says:

> "First, those in which the power of the state is exclusive; second, those in which the state may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all. The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference * * *."

In *Houston Central Ry. Co. v. Mayes*, 201 U. S. 321, the Court said at page 328:

> "As the power to build and operate railways and to acquire land by condemnation usually rests upon state authority, the legislatures may annex such conditions as they please with regard to *intra*state transportation, and such other rules regarding *inter*state commerce as are not inconsistent with the general right of such commerce to be free and unobstructed."

In *Pennsylvania R. Co. v. Hughes*, 191 U. S. at 488, the Court by Mr. Justice Day said:

> "It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

It therefore appears:

(a) The power of the nation is supreme and exclusive so far as respects interstate commerce;

(b) The power of the state is supreme and exclusive so far as respects intrastate commerce;

(c) The interference by a state with interstate commerce or by the nation with intrastate commerce must be direct and not indirect, or incidental;

(d) Congress has expressly recognised the right of the state in this control and has affirmatively exempted state traffic from the operation of the Act to Regulate Commerce.

DOES THE ORDER COMPLAINED OF AFFECT INTERSTATE COMMERCE?

The basis of the bill rests upon the following contentions:

1. The order applies to all freight moved under class rates between Portland and points on the lines of the appellant in Oregon east of The Dalles.

2. That freight brought into Portland in original packages and without coming to rest within Oregon or becoming part of the traffic of the state will be shipped from Portland to points east of The Dalles by carriers and persons bringing the same to Portland with the intention of immediately reshipping them; and that by the order, the rates established thereby apply to these shipments.

3. That in *some* instances and to *some* points in Oregon and Washington under certain tariff rules and formulae of appellant, rates from eastern points can not exceed the terminal rate to Portland plus the local rate from Portland back to destination. That wool rates to eastern points are also affected by changing the local rates. From California points the rate is generally arrived at by adding to the vessel or rail rate *to* Portland the local rates from Portland to destination named in the tariff affected by the order of the Commission.

4. That by reason of the order the movement of commodities handled by Baker City merchants in competition with Portland merchants, as well as the rate will be affected.

5. Other allegations are as to the effect on appellant's through rates by competing lines to Portland securing the advantage of the local rates.

We believe the foregoing statement covers substantially the grounds on which appellant bases its allegations and claim of interference by the order with interstate commerce. The real underlying basis of the bill, the theory on which it was framed and the case presented, is based upon the assumption that, if a carrier at any time uses a *local rate* as part of a *formula* in arriving at a through rate, then no matter how unreasonable and therefore unlawful a local rate may be, no authority can change it, as an interstate rate would be affected.

It is an attempt to defeat all state control over state rates, and to control the state rates through an interstate rate by using the local rate in arriving at the interstate rate. This fact will be elaborated when that point is discussed.

THE ORDER.

As has already been shown, it affirmatively appears the order was made on complaint, after due notice and full hearing. No complaint is made as to any jurisdictional defects or denial of any rights, or opportunity to be heard. There is no suggestion of newly discovered evidence, that the evidence did not justify the finding, that there are any facts not presented to the commission upon which appellant will rely, or that all the facts were not submitted to the commission.

The complaint was based on the unreasonableness of class rates only for the transportation of merchandise

and commodities between Portland and points on the complainant's lines of railway in the state of Oregon.

The changes made by the order affect *class rates only* within the state of Oregon, between Portland and points east of The Dalles, as shown in freight tariff L-525. In that book of rates the *particular rates* in question *as well as many other* rates are published.

The order is perfectly plain and certain, and does not purport or pretend to deal with anything but class rates on traffic within the state of Oregon.

The portions of the order necessary to the consideration of this question have already been set out in this brief (page 21), *ante*, to which we refer the court at this point for greater certainty as to its language. (See Record, pp. 182-184).

Just what phraseology is required to confine an order made by a state Commission to state rates, we do not apprehend. It would neither add to nor detract from the order to say the order refers wholly to intrastate commerce, for it could refer to nothing else. If it were attempted to be applied to interstate commerce, the attempt would fail and there is no such allegation made.

If it were made it would be of no importance, for if it were a fact, relief would follow instantly. No language used by the Commission could add to its powers.

Indeed it is not distinctly alleged or claimed the order in itself in any way attempts to fix or regulate interstate rates, but the effect of the order will be to regulate them to some extent.

As was said by the Court below:

"The express purpose of the railroad commission act is to regulate transportation and commerce, and common carriers thereof, within the state. This is apparent, both from the title of the act and from the provisions thereof. The title runs:

"To regulate transportation and commerce, and common carriers thereof in this state, and, for that purpose, to create a Railroad Commission of Oregon, etc.

"By the eleventh section the term 'railroad' is defined to embrace all corporations that now, or may hereafter, operate, manage, or control any railroad or interurban railroad * * * as a common carrier in this state. And it is further declared that:

"The provisions of this act shall apply to the transportation of passengers and property * * * and to all charges connected therewith, and shall apply to all railroad companies, etc., that shall do business as common carriers upon or over any line of railroad within this state.

"By section 13 it is required that every railroad shall file with the commission, schedules showing all rates, fares and charges for the transportation of passengers and property, 'which it has established and which are in force at the time between all points in this state upon its line;' by section 18, that 'whenever passengers or property are transported over two or more connecting lines of railroad between points in this state,' the joint rates of charge therefor shall be reasonable and just. These general provisions indicate an undoubted purpose to limit the scope of the exercise of the

commission's powers within the state. But by section 47 it is made the duty of the commission to investigate freight rates on interstate traffic on railroads in the state, and when, in the opinion of such commission, the rates are excessive or discriminatory, to present the facts thereof to the offending railroad company, and, if without avail, then to apply to the Interstate Commerce Commission for relief. From this one provision of the act, if from none other, the deduction is absolute that there was no intention on the part of the Legislature of the state to enter the domain of interstate regulation of railroad traffic. The commission is a state commission, designed to render state service, and no intendment should be deduced that it is empowered to execute a broader or an unlawful service, unless the language is explicit, unmistakably leading to such conclusion. No such language is found in the act, and upon its face it is not inimical to the commerce clause of the national Constitution.

"The order of the commission enjoining upon the complainant the adoption of the classification therein prescribed is not so specific, but the purpose is reasonably deducible. The mandate of the order is that complainant shall cease and desist from charging any higher rates within this state for the transportation of merchandise and other commodities between the City of Portland and points on the defendant's main, branch, leased or otherwise controlled railroad lines within the state of Oregon, covered by the class rates in said tariff No. L-525, O. R. C. No. 89, I. C. C. No. 1146, than the class rates prescribed in this order. Then follows the basis of the rates prescribed,

or rather the formula by which they may be readily ascertained. The order, therefore, can be effective only within the state of Oregon. In this there is no ambiguity. That the Western Classification was taken upon which to base the formula for ascertaining the rates ordered to be substituted cannot change the purpose of the order. The result would have been the same if the commission had fixed the same rates without using tariff L-525 as a basis for its formula. The order is not specific, however, in this: That it does not, in direct terms, say that the rates so fixed shall apply to the transportation of intrastate commerce only; but, considering that the commission is a state organism, imbued with authority to fix rates within the state and not beyond its confines, it is but a legitimate deduction that its purpose in promulgating the order was to prescribe rates effective as relating to intrastate, and not interstate commerce. Presumptions are always in favor of the lawful exercise of a power—not that it was unlawfully exercised, or that a functionary has exceeded the authority delegated or bestowed. So that, as matter of law, neither in the intendment of the act, nor in the draft of the order, has there been an invasion of the right and power of Congress to regulate commerce between the states." (Rec. 64.)

The case of *Chicago I. & L. Ry. Co. v. Railroad Commission* (Ind. Sup. Ct.), 95 N. E. Rep. 864, is directly in point. At page 868 of the opinion the facts and the conclusions of the Court from which we quote are set out at length:

"Appellant's next contention is that the order is void because it purports to interfere with interstate commerce. The order requires a tariff of $3 per car load for the movement of all commodities in car load in the switching service. There is nothing in the order limiting its application to intrastate commerce. Before the shippers' petition was filed with the commission, appellant had filed with the commission its terminal tariff in connection with the Indianapolis Southern. This tariff applied to both state and interstate commerce, and was the only rate sheet controlling such services at Bloomington. In the shippers' petition, the prayer for relief was for an order requiring defendants to issue and file just and reasonable rates for the switching of all car load traffic between their lines and all the industries at Bloomington, Indiana, and that the respondents be required to apply the same for two years, as required by law, to the movement of all traffic destined on either line at Bloomington, Indiana, *from points in Indiana.* (Italics ours). The petitioners further prayed that the Commission determine what are just rates for switching services in interstate traffic, at that point, and recommend to respondents to apply such rate, and in case of failure to apply it, that the Commission apply to the Interstate Commerce Commission for relief on behalf of petitioners.

"On the above petition the order was made. Of course the state commission had no power to adjust rates for interstate traffic. Appellee contends that the Court is not warranted in construing the order as having such application. There is nothing in appellant's complaint

to show that the Commission or shippers are contending for the application of the commission rates to interstate commerce, except the language of the order itself. No doubt, on motion by appellant, the order would have been so modified by the Commission as to expressly limit the rates to intrastate traffic. Such motion was not made. In *New York Central, etc., R. Co. v. Interstate Com. Com'n* (C. C.) 168 Fed. 131, the Court considered the effect of an omission of time limit in an order of the Interstate Commission. It was held that the law read the limitation into the order; that the Interstate Commerce Commission is an administrative tribunal, dealing with practical problems, and that strict rules of pleading should not be held applicable to it. Construing the order in the light of the petition, and the limits on the power of Commission, imposed by both the Federal Constitution and the statute creating it, we do not feel warranted in construing the order as intending to apply to interstate commerce," citing:

Pittsburg etc. R. Co. v. Railroad Com., 171 Ind. 189.

Chicago etc. R. Co. v. Railroad Com., 173 Ind. 469.

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307.

"The law presumes the acts of officers of the state to be rightly done and gives them faith accordingly." * * *

Interference by the state with interstate commerce being unlawful will not be presumed.

Burlington, C. R. & N. R. Co. v. Dey, 82 Ia. 312, 339.

In *Howard v. Illinois Cent. R. Co.*, 207 U. S. 463, 500, Mr. Justice Moody said:

> "The presumption that other branches of the government will restrain themselves within the scope of their authority and the respect which is due to them and their acts admit of no other attitude from this Court."

TARIFF L-525.

It is alleged in the bill of complaint that the order affects tariff L-525 and that this tariff contains the rates in question, and that the rates in some cases are used in arriving at the through rate and that a change in the tariff affects interstate rates, and that it is filed with the Interstate Commerce Commission.

This plea will not stand the test of the slightest analysis. The tariff which is before the Court is simply a large book containing many different kinds of rates on various commodities both interstate and intrastate.

It was not "tariff L-525," which is merely descriptive of the book in which certain rates are published, that was acted on by the Commission, but *certain state rates* published therein.

The fact that appellant chooses to publish for its own convenience all or many of its rates in one book and label that book "L-525" is of no consequence, nor does it affect the issues in this case.

It is the rate and not the book that is affected. Moreover the same book as appears from the bill of

complaint was on file with the Oregon Commission as required by law (O. R. C. No. 39) as showing such of the rates therein published as applied to state traffic and subject to state authority.

No presumption therefore follows because rates on intrastate traffic published therein were reduced that because the same book was on file with the Interstate Commerce Commission it was an interference with interstate commerce. If so, then the presumption would be equally strong that a change in interstate rates therein published would be an interference with the state commerce.

The order constantly refers to the *class rates* now in effect under tariff L-525, the tariff filed with the state Commission in compliance with law, as unjust and unreasonable, etc.

To avoid any possible conflict, appellant could print its state rates and interstate rates in separate books, and file them separately with the state and Interstate Commissions, and thus by this very simple expedient avoid the fanciful difficulty complained of.

At any rate the mere convenience of appellant in printing its tariffs is hardly sufficient grounds for setting aside the law of a sovereign state.

MATTERS AFFIRMATIVELY SHOWN BY THE ORDER AND COMPLAINT.

a. The rates in controversy are class rates only over the lines of the appellant between points within the state of Oregon.

b. There was a full hearing and investigation at which all parties were represented and participated.

c. No jurisdictional defect or abuse of power is alleged.

d. After due investigation and consideration of all the facts the Commission found the rates complained of unjust and unreasonable.

e. The Commission fixed class rates which they found to be just and reasonable over the appellant's main and branch lines on traffic between Portland and other points within the state of Oregon east of The Dalles.

f. The order applies to class rates only over the lines of the appellant within the state of Oregon.

g. The rates prescribed became effective twenty days after the service of the order.

ORIGINAL PACKAGE DECISIONS.

It is also sought to apply the doctrine announced in the "Original Package" decisions to the facts in this case, and the contention is advanced that as long as goods remain in original packages that that fact alone irrevocably fixes their status as interstate commerce and the state has no power or authority to name rates even for their movement within the state.

While the position above outlined is not stated in the exact language used above, the record shows beyond question that the statement as to the intent of the allegation is not denied.

In paragraph II of the Amendment to the Complaint (Rec. 77) this claim first appears as a definite allegation where shipments "in the same packages are referred to." The question is also referred to at page 304 of the Opinion, 173 Fed. Rep. (Rec. 69). It arose

again on argument on the demurrer to the amended to the complaint, and in passing on this question the Court said, 177 Fed. 820:

> "It still does not seem to me that this is the proper proceeding in which to determine the question attempted to be presented, as to whether goods shipped into Portland from outside the state in original packages, and sooner or later shipped out again to the interior of the state in the same unbroken packages, would constitute interstate commerce. This might depend upon how the goods were treated and considered while in Portland, or upon other conditions, that are not made to appear either by the original bill or by the amendment. If the order be valid, as it is held to be, then all shipments or commerce which are intrastate in character must be controlled by the order; all that are not are not affected by it. If question arises as to any particular shipment or any particular commodity to be moved, or in process of transportation, it might be settled by carrying the matter to the commission; or if the commission unlawfully exacts the state rate upon interstate traffic, I see no reason why it may not be enjoined in any Court of competent jurisdiction. The special cases must necessarily be determined as they arise, as it is impossible, by a general decree, to determine in advance what specific commodities and the transportation thereof constitute interstate and what intrastate commerce." (Rec. 88.)

Thereafter as appears from the record, the temporary restraining order was dismissed, an injunction denied, and the rates under the order went into effect.

APPLICATION FOR REPAYMENT OF EXCESS CHARGES COLLECTED.

On application for repayment for difference in rates collected under former tariff and under the order, payment was refused by appellant on certain shipments in original packages, thus bringing the point squarely before the Court and making clear the exact contention in this respect of appellant.

The question was presented by the petition in intervention of W. S. Smallwood (Rec. 90).

Three shipments as being representative in their character were presented:

A. Shipment of assorted groceries in original packages by Allen & Lewis from Portland, Oregon, to La Grande, Oregon.

The goods were purchased in other states than Oregon by Allen & Lewis, to become part of their stock in trade at Portland. They were billed and transported to Portland by water and by rail. On arrival the bills of lading were surrendered, the freight paid, possession taken by Allen & Lewis, and were then taken in original packages to the store rooms of Allen & Lewis, became part of its stock in trade, held an indefinite period and thereafter sold from said stock in the original packages and transported to La Grande in said packages.

B. Shipment of sugar in original sacks by Allen & Lewis from Portland to La Grande, Oregon.

The sugar shipped was a portion of a larger lot purchased in California by Allen & Lewis to become part of its stock in trade at Portland. It was billed and transported to Portland its point of destination by an independent water carrier, having no connection what-

ever with appellant. On arrival at Portland, the bill of lading were surrendered, the freight paid, possession taken, and the sugar in the original packages taken to the store and warehouse of Allen & Lewis, became a part of its common stock in trade carried by it for sale, then held an indefinite period for sale and thereafter shipped from its stock in Portland in original packages as received and transported by appellant to La Grande, to be held by the consignee for the account and subject to the order of Allen & Lewis.

C. Shipment of sugar in original packages by Lang & Co. from Portland to Baker City, Oregon.

This sugar was purchased in California by Lang & Co. for future sale by it at Portland, with the intention of shipping it from Portland to some point within the state of Oregon. It was transported to Portland by an independent water carrier, having no connection with appellant. On arrival at Portland the bill of lading was surrendered, freight charges paid and possession taken in packages as shipped from San Francisco. It was placed in a warehouse at Portland, insured against loss by fire by Lang & Co. in its own name and as owner thereof, held by it in warehouse until sold and then supplied for loading, and the same was sold after its arrival at Portland to the Baker City Grocery Company by Lang & Co., and reshipped by Lang & Co. to the Baker City Grocery Co. at Baker City, Oregon, over the lines of the appellant under a bill of lading issued by the appellant; and was transported by the appellant thereunder to Baker City in the original packages and there delivered by the appellant to said grocery company, who paid the transportation charges thereon

for transporting the same from Portland to Baker City.

This statement may be prolix but it is deemed important this Court should know just what the allegations of the bill mean and the character of shipments appellant contends is interstate commerce and not subject to the order. We also have the right to assume that, as this record was prepared at appellant's request, it was intended this Court should consider this question in passing on the case.

The Court held the shipments to be intrastate commerce subject to the order (Rec. 96).

The question is important in indicating the extent public carriers go in their effort to be relieved from state control, and as we shall hereafter show, any control, either state or national, as to a very considerable part of their traffic.

ISSUES ON PETITION IN INTERVENTION.

The following facts apply to each shipment:

a. The goods were originally purchased in other states, shipped to jobbers in Portland by various means of conveyance in original packages. In two of the cases, the goods were originally brought to Portland by independent water carriers having no connection with any railroad.

b. The goods in the first instance were billed and transported to Portland, their point of destination, bills of lading surrendered and possession taken by the consignee and the transportation under the contract ended.

c. They were then taken to either stores or warehouses of jobbers in the City of Portland, placed in common stock carried by the jobbers for sale at Port-

land, Oregon, and held indefinitely for sale.

d. They were sold, and under a new and distinct contract transported in the original packages to various points in the state of Oregon.

e. The goods when purchased were intended to be resold in the regular course of business by the jobbers who originally purchased them.

We therefore have three salient controlling facts:

(1) A definite contract of transportation actually completed.

(2) An actual delivery to the consignee at the point of destination.

(3) A subseqent sale and shipment, wholly within the state.

Should the Court consider it of any importance, it further affirmatively appears that all of the goods in question were purchased in other states and not imported from foreign countries.

Appellant contended in the Court below, and we assume will contend in this Court, that while the shipments were intrastate, the commerce was interstate. The contention was based on two theories: (1) The intention to resell the goods in original packages impressed them with an interstate character, which could never be removed until the packages were broken and goods actually distributed. (2) Being held and sold in the original packages, they remained interstate commerce until the packages were broken.

AUTHORITIES.

The case of *Gulf, Col. & Santa Fe R. Co. v. Texas*, 204 U. S. 408, is controlling and decisive as to this question.

In that case the H. G. Co., at Kansas City offered to and did sell S. & B. two carloads of corn at Goldthwaite, Texas, for delivery on track at Goldthwaite. To fill the order, the H. G. Co. contracted with the H. C. Co. of Kansas City for the purchase of two cars of corn to be delivered to the H. G. Co. at Texarkana.

At the time of the purchase by the H. G. Co., its manager intended that the corn it purchased should go to S. & B. and should be shipped to Goldthwaite from Texarkana.

The joint through rate on corn from Kansas City, Mo., to Goldthwaite, Texas, via Texarkana, Texas, was 85 cents. The *interstate* rate from Kansas City to Texarkana was *18 cents;* the *intrastate* rate from *Texarkana to Goldthwaite fixed by the State Commission was 14 cents, a total of 32 cents,* or three cents less than the through rate from Kansas City to Goldthwaite. Because of these rates and its knowledge thereof the consignee ordered the cars of corn for delivery at Texarkana, the final destination being Goldthwaite. On reaching Texarkana the original bills of lading were surrendered and the same cars forwarded under new bills of lading over the T. P. R. R. to Goldthwaite. The cars were never unloaded, nor the seals broken, but were transferred in the original cars without breaking bulk to the T. P. R. R. and by it transported to Goldthwaite. On reaching this point the consignee tendered the charges prescribed by the State Railroad Commission, which the agent declined to accept and demanded and collected a larger sum. The railroad company was fined by the state court for extortion and the case was taken to the Supreme

Court of the United States on a writ of error. In passing upon the case, the Court, speaking by Mr. Justice Brewer, said (page 411):

> "The single question in the case is whether, as betwen Texarkana and Goldthwaite, this was an interstate shipment. If so, the regulations of the state railroad commission do not control, and the Court erred in enforcing the penalty. If, however, it was a purely local shipment, the judgment below was right and should be sustained."

The Court in passing upon the case *inter alia* said:

> "It is, however, contended by the railway company, that this local transportation was a continuation of a shipment from Hudson, South Dakota, to Texarkana, Texas; that the place from which the corn was started was Hudson, South Dakota, and the place at which the transportation ended was Goldthwaite, Texas; that such transportation was interstate commerce, and its interstate character was not affected by the various changes of title or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite. * * * The first contract of shipment in this case was from Hudson to Texarkana. * * When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company to be delivered by it, under its contract with such owner. * * * *Whatever may have been the thought or purpose of the Hardin Com-*

pany in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.

"In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. *The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.*

"It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond

the state limits, and the carrier ought to be able to depend upon the contract which it has made, and must conform to the liability imposed by that contract." (Italics ours.)

The Interstate Commerce Commission has uniformly followed this ruling of the Supreme Court.

> *"A shipper has the right to consign a shipment to a given point, pay charges upon it, assume custody, take possession, and later reship to another point under rates lawfully applicable to such reshipment."*
>
> *Morgan et al. v. M. K. & T. Ry. Co. et al.*, 11 I. C. C. Rep. 525, 523.
>
> *Montgomery Freight Bureau v. Western Ry. of Ala.*, 14 I. C. C. Rep. 150.
>
> *Marshall Oil Co. v. C. & N. W. Ry. Co.*, 14 I. C. C. Rep. 210.

Kurtz v. Pennsylvania Co., 16 I. C. C. Rep. 410, 412, was a case where the sum of two locals was less than the through rate and the defendant urged that it would be illegal upon the part of the complainant to obtain through transportation at less than the published through rate and illegal upon their part to permit it.

> "If, they say, the complainant *knowing that he is to make a through journey from New Castle (Pennsylvania), to New York,* purchases a local ticket for $1.00 to Pittsburg and a local ticket from Pittsburg for $10.50, for the purpose of thereby securing through transportation at $11.50, which is less than

the published through rate, he is guilty of a violation of the Act to Regulate Commerce; and the defendants, if they knowingly permit this practice, are equally guilty."

The Commission referred to the case of *Savannah Bureau vs. Charleston & Savannah R. R. Co.*, 7 I. C. C. Rep. 601, in which a through rate was greater than the sum of the locals. That is, the rate from Charleston to the state line was $3.00 and from the state line to Savannah $2.00, while the through rate was $6.00. The railroad would have no right to sell two local tickets for $5.00, for that would be an evasion of its published tariff rates. The Commission said (page 418):

"Upon the other hand, this Commission has stated in its administrative rulings, and now repeats, that the passenger may properly pay his fare from Charleston to the state line and again from the state line to Savannah, *although he thereby obtains through transportation between these points for less than the published through rate, and although he does so, knowing that he is to go from Charleston to Savannah, and deliberately seeking this means of obtaining transportation at less than the through rate.*

"The reason for this is that not the intent of the parties but the actual transaction must be regarded, as was held by the United States Supreme Court in Gulf, Colorado & Santa Fe R. R. Co. v. Texas, 204 U. S. 408." * * *

"The Charleston & Savannah Railroad Company sells to all the world tickets from Charleston to the state line for $3.00, and again from the state line to Savannah for $2.00. A passenger may purchase his ticket to the state line, and when he arrives there

that contract of transporation is at an end. He now purchases another ticket from the state line to Savannah and a new contract of transportation begins. If the regulations of the railroad company permit it, he may, instead of purchasing a ticket, pay his cash fare upon the train, to the same effect. He has indeed, secured through transportation for less than the through rate, but he has done so by putting together two local transportations at the local rates."

The Commission then held that the complainant might have entered the train at New Castle, intending to go to New York, used his local ticket to Pittsburg and his mileage ticket from Pittsburg, without violating the Act to Regulate Commerce, and defendants, had they known of the transaction and made no effort to prevent it, would not have been guilty of moral or legal wrongdoing, and the complainant would have been quite within his legal rights. (Italics ours).

Dobbs v. L. & N. R. Co., 18 I. C. C. Rep. 210, is in point. The complainant shipped three carloads of canned peaches from Oakhurst, Ga., to Marietta, Ga., and from thence rebilled one car to Lexington, Ky., and two cars to Cincinnati, Ohio. The through rates from Oakhurst to Lexington were 58 cents per hundred pounds and 60 cents to Cincinnati. A commodity rate of 27 cents from Marietta to Lexington and Cincinnati was in effect. A local rate of six cents was in effect from Oakhurst to Marietta, thus making the combination 33 cents. The complainant had applied to the carrier for a 27-cent rate from Oakhurst. Before the request was complied with he had shipped the three

cars in question. There was no dispute that complainant intended the cars for interstate shipment nor that he voluntarily sought to secure the lowest rate by shipping on the local rate to Marietta and thence to destination. He sought reparation on the basis of the rate from Marietta, claiming the Oakhurst rate was unreasonable. The defendant railroad claimed the movement from Oakhurst to Marietta was intrastate and that the rate from Marietta to destination was conceded reasonable. The Commission said:

> "Complainant did not attempt to make a through interstate shipment when tendering this freight to the carrier, and he expressly absolves the agents of the carrier from conniving for the purpose of defeating the through rate on canned goods. He states in this connection: 'The rates were given me, and the one from Oakhurst was so unreasonable that I took the best combination that I could make from them.' *By taking the course he did, complainant voluntarily adopted a movement and a rate applicable thereon which were intrastate in character. Gulf, Colorado & Santa Fe v. Texas*, 204 U. S. 403. *Moreover, separate contracts were made for the two movements; charges for the first movement were paid at Marietta and did not follow the shipments to destinations.*
>
> *"Under the facts of record we find that the commission is without jurisdiction of the movement from Oakhurst to Marietta to which was applied and collected the separately established state rate,* and as there is no allegation of unreasonableness as to the separately established interstate commodity rate from Marietta to

destinations, the complaint will be dismissed, and it will be so ordered." (Italics ours.)

In *Southern R. R. Co. v. Hunt (Ind.)*, 81 N. E. 721, the Court held that in fixing local freight rates on coal, the fact that the coal handled was interstate traffic did not affect the jurisdiction of the Commission to fix rates since the matter in controversy is a local rate and not a particular shipment.

When the charge and the actual transportation are confined to the limits of the territory of the state, it is not interstate commerce and is subject to state control.

Wabash, St. Louis and Pacific R. Co. v. Illinois, 118 U. S. 557.

"The *beginning* and the *ending* of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Errol*, 116 U. S. 517, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown v. Houston*, 114 U. S. 622, the point of time at which it arrives at its destination. But intermediate between these points questions may arise. *State, Detmold, Prosecutor v. Engle*, 84 N. J. L. 425; *State, Lehigh & W. Coal Co., Prosecutors, v. Carrigan*, 89 N. J. L. 35; *The Daniel Ball (The Daniel Ball v. United States)*, 10 Wall. 557."

General Oil Co. v. Crain, 209 U. S. 211, 228.

When "property is at rest for an indefinite time, awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But, if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment."

General Oil Co. v. Crain, 209 U. S. 211, 229.

The case of *American Steel & Wire Company v. Speed*, 192 U. S. 500, 519, is directly in point. In that case the question as to when interstate commerce ceased was fully discussed. In addition the "original package" question was presented as well as the fact that the goods in question were sold and intended for delivery in other states. Not only that but the Wire Company maintained merely a warehouse and not even a store at Memphis. It was alleged that the Wire Company, for the purpose of facilitating the sale and delivery of goods by it manufactured, had selected Memphis, Tennessee, as a distributing point, and had made arrangements in that city with a transfer company to take charge of the products when shipped to Memphis, store them in a warehouse, assort them, and make delivery of the goods to persons to whom goods were sold by the Wire Company. It was averred that the transfer company was only a carrier, and the Steel Company *was not a merchant in Memphis, but simply a manufacturer billing goods in original packages made in other states to the persons who had bought them.* It was alleged that the *goods in the warehouse in Memphis were merely in transit from the point of*

manufacture outside of the state to the persons to whom they had been previously sold and that the tax on the goods in Memphis was void, amongst other reasons because they had acquired no situs in Tennessee and were moved in channels of interstate commerce from the place where the goods were manufactured for delivery to the persons to whom, in fact, they had been sold.

The case was first heard in the state courts and determined against the Steel Company, and a writ of error prosecuted to the Supreme Court of the United States. Among the facts found were that the Transfer Company received the manufactured products at Memphis, assorted and delivered them either to the jobbers at Memphis, or to jobbers beyond the limits of Tennessee over the various lines of railroads and steamboats running into Memphis, as directed by complainant. It was found that the transfer company did not sell any of the complainant's products, or have any knowledge whatever of the prices at which the goods were sold; that their business was simply that of transferring and delivering under orders of the Steel Company. The goods of the complainant were manufactured at different points, shipped to Memphis to warehouses, assorted and distributed. Sales agents of the Steel Company canvassed the country, making contracts exclusively with jobbers, and the goods contracted for are described as *so many kegs of nails, so many kegs of staples, so many reels of barbed wire,* or so many *coils of smooth wire,* etc. The grade and quality was left open, and the customer can, when he makes his specifications, select any grade of goods he desires. In fixing the prices of these goods the com-

plainant always figures in the freight on the goods except when necessary to lower prices in order to meet competition. *The contracts are made usually before the goods arrive at Memphis, their point of destination, and generally in advance of the production of the goods at the complainant's factory; and the canvass for orders is made not only in advance of the shipment of goods but in advance of their production.* The orders are filled under an order from the Chicago office addressed to the transfer company at Memphis and selected by the latter out of the list of goods belonging to complainant in the warehouse. For the convenience of the Memphis trade the complainant advises the transfer company of the names of its customers there, and that company is instructed to deliver the goods embraced in the contracts with the Memphis jobbers, upon delivery of a letter to the transfer company which delivers the goods, attaching the dray receipt to a copy of the specification and forwarding the specification, letter and dray receipt to the office of the company in Chicago, where the invoice is made out and sent direct to the jobber. About ninety per cent of the goods kept on hand in Memphis ultimately goes to jobbers who reside outside of Memphis, and beyond the limits of the state. The remaining ten per cent goes to the Memphis jobbers. *All the goods forwarded to Memphis are products of the factory of the complainant; no part of them is ever purchased by it; complainant's goods are put up in the following original packages; nails and staples in kegs; smooth wire in coils tied by wire and barbed wire on reels. Each package is separately and distinctly made up at the*

factories for convenience of transportation, and is in this form delivered to the carriers at the initial point of transportation, and are in this form transported, assorted and delivered by the transfer company to the complainant's customers at Memphis, or shipped out of Memphis and beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign state. Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed in any particular from the time it leaves the factory until it ultimately reaches the hands of the customers. The Supreme Court said (page 518):

> *"With these facts in hand we are of the opinion that the Court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consummated."* (Italics ours.)

ORIGINAL PACKAGE DOCTRINE NOT APPLICABLE

This doctrine is not involved in this case. The term "original package" is said to be simply "a convenient form of expression adopted to indicate that a license tax could not be exacted of an *importer* of goods from a *foreign country* who disposes of such goods in the form in which they were imported."

Cooke, Commerce Clause of the Fed. Const., 17.
Brown v. Maryland, 12 Wheat. 419.
Cook v. Marshall County, 196 U. S. 261.

In *Brown v. Maryland, supra*, the court said (page 441):

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

The leading case of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, *supra*, in which all the questions and many of the cases are considered and discussed, would seem to be determinative of this question as ought to be applied in this case. At page 519 the court said:

> "Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, *if the bringing of the goods into Tennessee from another state constituted an importation, in the constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported*

in the legal sense, and were subject to state taxation after they had reached their destination and whilst held in the state for sale. This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown v. Maryland*. *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091. The doctrine upon which the cases rest was this, *that imports, in the constitutional sense, embrace only goods brought from a foreign country, and consequently do not include merchandise shipped from one state to another*. The several states, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the state." (Italics ours.) See also *May v. New Orleans*, 178 U. S. 496.

INTERFERENCE WITH STATE COMMERCE.

It would seem *appellant is asking this court to interfere with state commerce; the state is not seeking to interfere with interstate commerce*. It should be borne in mind that in the case at bar the contract for transportation was ended, the goods stored in stock for sale, intermingled with the common mass of the property of the state, and whether in original packages or out of them were subject to the laws of the state of Oregon. If appellant's theory is correct, Congress has power, under such circumstances as those above outlined, not only to regulate the sale and control of the use of the

goods remaining in original packages, but to say what rate shall be charged for transporting the goods between points within the state of Oregon, or else there is no power or control over them vested in any authority.

ANALYSIS OF THE ORIGINAL PACKAGE CASES.

The case of *Leisy v. Hardin*, 135 U. S. 100, and *Lyng v. People*, 135 U. S. 161, are known as the "original package" cases. In considering these decisions their application depends upon the facts involved.

Congress has, of course, the power to regulate interstate commerce, and as a general rule any attempted regulation of such commerce by a state would be void. On the other hand every act on the part of a state that may remotely or indirectly affect interstate commerce is not void. The original package decisions to be understood must be studied both in light of the facts and of the constitutional provisions involved.

Brown v. Maryland, supra, dealt with the right of a state to tax imported goods. It will be noted *this case refers to importations from foreign countries only, and the constitutional prohibition is limited to the time the goods are held by the original importer in his warehouse unsold and in original packages.* When sold their distinctive character is lost, whether remaining in original packages or not. It was sought to apply this doctrine to importations between states, but the Supreme Court held otherwise. In *Woodruff v. Parham*, 8 Wall. 123, the court held, as stated in the syllabus, "The constitutional provision against taxing imports by the states does not extend to articles brought from another state."

Taking up the other class of cases arising under the commerce clause of the constitution, we refer, first, to *Leisy v. Hardin, supra.* The points decided in that case of interest here are, as stated in the syllabus, as follows:

> "A citizen of one state has the right to import beer into another state and the right to sell it there in its original packages. * * * The right of transportation of an article of commerce from one state to another includes the right of the consignee to sell it in unbroken packages at the place where the transportation terminates."

Lyng v. People, supra, follows *Leisy v. Hardin.*

These questions are not involved in this case. The court is not asked to pass upon the question whether a jobber has a right to purchase goods in other states and ship them in this state and resell them. The sole question is whether, after the transportation ends and the property has gone into the hands of the jobbers in the City of Portland and they resell it, and it is shipped to a local point in the state of Oregon, the last movement is intrastate commerce or interstate commerce.

Cattle dealers, receiving shipments of cattle bought by them for sale seldom being held longer than one day, are subject to taxation in state when received, even though some of them are purchased in other states with the intention of exporting them to foreign countries.

Myers v. Baltimore County, 83 Md. 385.

When products are shipped from one state and lodged in another state then to be offered for sale in the

open market, such products lose the character of interstate commerce and assume a domestic character.

Manufacturing Co. v. Wright, 97 Ga. 114.

L. B. Price Co. v. City of Atlanta, 105 Ga. 358.

In a case involving the control of the state over intrastate commerce, the Supreme Court in *Missouri P. R. Co. v. Kansas ex rel. Taylor,* 216 U. S. 262, 288, referring to one of the propositions advanced, said:

> "2. *That the order was void because it operates a direct burden upon interstate commerce.*
>
> "To support this proposition it is urged that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and therefore for an interstate railroad. This being its character, the argument proceeds to assert that the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce, and beyond the control of the State of Kansas. But this simply confounds the distinction between state control over local traffic and federal control over interstate traffic.
>
> "To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless, at the same time, it was held that the incorporation of the road had operated *to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the constitution of the United States.* Manifestly, the mere fact that the charter of

the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and of course could not project the authority of Kansas beyond its own jurisdiction. The charter therefore left the road for which it provided subject, as to its purely local or state business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the constitution upon the government of the United States."

EXTENSION OF ORIGINAL PACKAGE DOCTRINE.

While it may be this "doctrine" has been extended beyond its original scope, we doubt if a court was ever asked to extend it to the extent sought in this case. Originally the cases arose on the taxation by a state of imported goods, while remaining in original packages in the hands of the importer unsold. Later it was applied to laws prohibiting the sale of intoxicating liquors, cigarettes, taxation and the like. But in no case even of foreign importation has the doctrine been extended to cover the packages *after sale* by the importer whether in original packages or not.

This court is now asked to hold that until an original package is actually broken up, it continues interstate commerce, no matter how often sold, the number

of hands it passes through or where sold, whether within or without a state, or by the original importer of the last of a series of purchasers and even in cases where it is conceded the shipments are purely intrastate.

The doctrine contended for by appellant would eliminate from all control as to rates, goods in original packages originating outside of a state so far as respects intrastate movement. The state rates under this theory would not apply, and as the Supreme Court says Congress has no jurisdiction, there is no authority to control.

Such a doctrine has no justification in reason under the constitution or the law.

ALLEGED INTERFERENCE WITH INTERSTATE COMMERCE ARISING FROM FACT THAT IN CONSTRUCTING INTERSTATE RATE TARIFFS TO OREGON POINTS APPELLANT USES THE INTERSTATE RATE TO PORTLAND AS A BASE PLUS THE LOCAL RATE FROM PORTLAND TO DESTINATION.

The court will, we assume, take notice of facts shown by the official census. Portland is by far the largest city in Oregon. It is the commercial, distributing and financial center of a large section of country. The trade and exchange of products between Portland and other places in Oregon is very large. It is the terminal of a number of transcontinental railways. It is at the head of deep sea navigation, and at the Junction of the Columbia and Willamette Rivers, both of which are navigable. A number of lines of steamers, both regular and independent, operate between Portland and San Francisco. Regular lines also

operate between Portland and Atlantic coast points. It is therefore a large transportation center and to and from some territories highly competitive. The appellant's railway is the only means of transportation for a large part of the territory in Oregon east of The Dalles.

The importance to the appellant to be able to make its rates on state traffic between points within the state over its lines, whether originating in Oregon or brought to Portland or any other point on its lines of railway, free from interference of any regulative authority, is apparent. The Interstate Commerce Commission has and can have no authority to regulate state traffic. If it is held any change in a local rate that may in any wise affect a through rate, is an interference with interstate commerce, then the state will be deprived of all power of rate control, as there is no difficulty in using locals as part of through rates or making through rates based on some point like Portland. Moreover, such a result would work to the enormous disadvantage of the people of the state and to all independent water carriers. The railroad with its boats could name a through rate, using its high local out of Portland, which might be perfectly reasonable for the entire haul, yet that part of the rate applicable to Portland by water be so low no independent carriers could exist, and no power could correct the injustice.

At the time the order complained of was made by the state railroad commission, the appellant in conjunction with other carriers was engaged in the transportation of interstate commerce through the City of Port-

land from Eastern and California points of origin to points of destination in the states of Oregon, Washington and Idaho.

MANNER IN WHICH INTERSTATE RATES WILL BE AFFECTED BY THE ORDER, AND REASONS GIVEN FOR THE CLAIM THAT THE ORDER INTERFERES WITH INTERSTATE COMMERCE.

Appellant is a party to a number of joint through tariffs which were in effect when the order complained of was made by the state commission. These tariffs and their numbers and the fact that they have each and all been duly published and filed with the Interstate Commerce Commission and were in effect at the time the order in question was made, are set out in the bill of complaint. The class rates in all these tariffs are governed by the western classification.

RATES FROM CALIFORNIA TERRITORY.

From San Francisco and other points in California shipments are made to inland points in Oregon beyond Portland, either by water over the San Francisco & Portland Steamship Co. or by the Southern Pacific Co. to Portland, and thence over the lines of appellant to destination. Where shipments are made by water through rates are established by adding certain arbitraries or local rates from points of origin to Portland to the rates fixed in Tariff L-525, from Portland to destination. Tariff L-525 contains the class rates changed by the order.

In case of rail shipments from points of origin on the lines of Southern Pacific Co. in California through rates consist mainly of a combination of certain arbi-

traries or local rates from point of origin to Portland, added to the local rates found in Tariff L-525 from Portland over the lines of the appellant to points of destination.

It is therefore alleged that the order of the state commmission reducing class rates over the lines of the appellant between Portland and other points in Oregon on account of the method used by appellant in making through rates as above described directly affects interstate rates and is therefore void.

RATES FROM EASTERN POINTS OF ORIGIN.

From eastern points of origin to Portland, rates are generally lower than from the same points of origin to intermediate points in Oregon. Rates to intermediate points in Oregon from eastern points of origin are arrived at as follows:

Commodity or class rates are named in the tariff to all points, but the tariff provides that where a rate to or from the point of origin to Portland, added to the local rate from Portland to any point in Oregon east of The Dalles, as fixed in Tariff L-525, is lower than the rate directly named in the tariff to the same point, then the combination of such transcontinental rate to Portland and the local rate back will govern. Generally the combination rate is lower than the class rates as fixed in the tariff and generally higher than the commodity rates, but commodity rates as now fixed in the tariff from eastern points of origin to some points of destination in Oregon east of The Dalles are greater than the combination made up of the transcontinental rate and the local rate back, as fixed by the order of the commission.

It is alleged in many cases an interstate rate would be affected by the reduction of the local rates and the order is therefore void as an interference with interstate commerce.

WOOL RATES.

Rates on wool from points in Oregon to eastern points of destination, it is alleged will also be affected by a change in the local rates. The rate on wool from Portland to certain eastern points of destination is $1 per hundred pounds. Wool in grease in bales on local shipments takes a third class rate under the western classification. Commodity rates have been named by appellant and other connecting carirers from points east of The Dalles to eastern points of destination on wool. These rates are equal to or less than the combination of the third class rate from points in Oregon east of The Dalles to Portland, added to the Portland rate of $1 to eastern points of destination.

It is alleged that unless the rate from the point in the interior was reduced, direct shipments of wool would cease and the wool be first transported to Portland on the local rate and then east on the through rate, and therefore the order interferes with interstate commerce and is void.

RELATIONSHIP OF RATES—BAKER CITY—PORTLAND.

Under paragraph 22 of the complaint there is an allegation which we assume is intended to state that because the order, if enforced, would change the relationship of rates from California and eastern points of origin to Baker City and Portland, it discriminates in

favor of jobbers doing business in Portland as against jobbers doing business in Baker City. This feature is briefly discussed *infra*.

EFFECT ON COMPETITORS.

Under paragraph 23 there are allegations as to how the effect of this order will be to compel appellant and its connected lines to reduce their rates from eastern points of origin to points east of The Dalles in Oregon. Otherwise the Northern Pacific Railway Company, a competing line, would secure the business. This we will also refer to more at length when we discuss this question.

Reduced to its last analysis the bill shows that interstate rates to points on appellant's lines in Oregon are largely made by using the through rate to Portland as a base and adding to it the local rate.

It is therefore claimed the local rate cannot be changed because such change will affect the through rate, and therefore on all domestic commerce moving under these local rates appellant can charge what it sees fit, *provided* the sum of the two rates do not exceed a reasonable through rate, over which *through rate only* the Interstate Commerce Commission would have jurisdiction.

ORDER DOES NOT AFFECT INTERSTATE RATES DIRECTLY.

It should be also noted it is not alleged that the order attempts to or will directly affect any interstate rate except as the local rates are used in connection with some rule or other rate to arrive at the through rate.

Nor does it have this effect on all shipments. The bill of complaint taken in connection with the tariffs which are a part of it shows the limited application of the order.

DOES NOT AFFECT ALL THROUGH RATES.

For the purpose of this argument it is unnecessary to analyze all the tariffs filed as part of the bill, but the tariffs show that under no circumstances can it affect traffic between Portland and The Dalles, nor any business to which the Pendleton, Oregon, basis of rates applies, nor where there are lower commodity rates, rates lower than the combination of rates referred to or any movement not covered by class rates in the tariff in question. Therefore under the complaint itself, as to some shipments the order would be lawful and on others unlawful, and unlawful only because of the method of rate making adopted by the appellant for its own convenience. In other words the mere convenience of the carrier, a formula to arrive at a rate, is attempted to be used as a basis to deprive a state of a constitutional right, and justify the imposition of unjust and discriminatory rates on domestic commerce.

It would seem that a very obvious and simple expedient would remove this difficulty at far less cost and trouble than an appeal to a court of equity.

If appellant would name and publish its through rate to all points, and if confusion results from naming all its rates in one book, publish its local rates separately, then, except where natural laws control and lawful rights of shippers can be exercised, its cause of complaint would be eliminated.

This, however, is not the real purpose of this and other similar suits now pending in this and other courts, as it is believed will be demonstrated hereafter.

AUTHORITIES.

While it is believed there are decisions controlling this question, there are certain principles which are fundamental and which demonstrate the sophistry of the plea.

Under both the act to regulate commerce and the Oregon act all rates must be reasonable and unreasonable rates are unlawful.

Reduced to its last analysis the argument of appellant leads but to one conclusion: The state has no control over a local rate so long as the local rate is or may be used as a factor in arriving at an interstate rate.

The local rate may be unreasonable and therefore unlawful under the law, but the state, the only authority having jurisdiction, is powerless to enforce the law, because, forsooth, a carrier is using it as one factor in arriving at what may be a reasonable through rate.

That we are not exaggerating appellant's position we quote from the opinion of the court below. (Rec. 66).

> "It seems to be premised by counsel for complainant that the commission's order does not relate to purely internal commerce originating within the State of Oregon, or such commerce as may be appropriately designated intrastate commerce. If this premise be admitted it must be at once conceded that the state commission has attempted to act beyond the scope of its authority. Counsel's premise is at

fault, however. As has been previously shown, the commission presumptively has acted within the scope of its authority, which was to prescribe rates applicable to the transportation of intrastate commerce only. *But beyond this, it seems to be thought that if a state tariff affects an interstate tariff in the slightest measure, though incidentally, it must give way to the latter, and hence is void and inoperative.*" (Italics ours.)

THE APPELLANT IS ORGANIZED UNDER THE LAWS OF THE STATE OF OREGON AND IS SUBJECT AS TO ITS STATE BUSINESS TO LOCAL CONTROL.

The law requires all rates to be reasonable, state as well as interstate, and if a carrier uses a local rate in any way as a factor in arriving at an interstate rate, it does so knowingly and subject to state control.

In *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, it was claimed that because the corporation was incorporated under an act of Congress, that its operations were removed from the control of the state. Passing upon this point the court said:

> "There is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state and to other points also within the state, and that in so doing it would

be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. * * * Without, therefore, replying at all upon any acceptance by the railroad corporation of the legislation of the state, passed in 1878 in respect to it, we are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates and other police regulations."

In *Reagan v. Farmers Loan & Trust Co.*, *supra*, will be found numerous statements sustaining state control. To the same effect see *Smyth v. Ames*, *supra*.

In the case of *Ames v. Union Pacific Railroad Company*, 64 Fed. 165, Mr. Justice Brewer, at page 171 of the opinion, says:

"Again it is insisted that this act interferes with interstate commerce, in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and, in the second place, by reducing local rates, it necessarily reduces the rates on interstate business. Neither of these objections seems to me to be well taken. In the first place, the classification of freights by the railroads is a purely voluntary act, not compelled by any statute, and not uniform throughout the country. There is one system which prevails east of Chicago, and one west. It might be more convenient if the classification established by this act harmonized with that adopted by the railroad companies doing business west of Chicago; but surely the voluntary act of the railroad companies, in establishing a uniform classification for certain territory, can work no limitation on the power of the state to establish a

different classification. To say, for instance, that because the railroad companies have voluntarily placed flour in a certain class, on which a specified rate is to be charged, such voluntary act of mere classification destroys the power of the state to establish a classification which puts flour in another class, and subject to another rate, is, to my mind, a most extravagant pretension. Neither can I understand how the reduction of local rates, as a matter of law interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the state does not work a change is interstate rates, any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state."

In *Armour Packing Company* v. *United States*, 200 U. S. 56, 82, the court says:

"If the shipper sees fit to make a contract covering a definite period, for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate, in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

A fortiori, if a railroad company sees fit to make a [illegible] rate any part of the formula in arriving at an in-

terstate rate, it must be taken to have done so subject to possible changes made in the local rate by state law.

It appears by the tariffs referred to that many of the interstate rates of complainant would not be affected under any circumstances by the order of the commission. We therefore arrive at a situation where as to some local rates the state has regulative power, but as to others it cannot exercise it, because they are used as a part of a through rate. *The most salient characteristics of a rate considered abstractly, are that it is an entirety, the single charge for the whole service which is performed.*

Beale & Wyman on Railroad Rate Regulation, Sec. 661, is to the effect that the sole, the only test under the law is a simple one.

Is the interstate rate reasonable? If not, it is unlawful. Is the local rate reasonable? If not, it is unlawful. Not whether a terminal rate plus a local is a reasonable rate, or leads to a reasonable interstate rate. These questions do not concern a court. The question is a rate, not a formula. What is to be considered is the lawfulness of the rate, or in other words, its reasonableness.

MEASURING REASONABLENESS OF STATE RATE BY INTERSTATE RATE.

This court has on more than one occasion condemned the practice of attempting to measure the reasonableness of a local rate by an interstate rate over the same line where part of the haul was within and part without the state.

The case of *Louisville and Nashville Railroad Company v. Eubank*, 184 U. S. 27, is sometimes cited as

justifying the claim that a state cannot regulate local rates if by so doing interstate rates may be affected. An analysis of this case shows that the case is not authority for any such contention. In that case the question the court passed on, was whether the state could control an interstate rate within its borders, and stated (page 86), "we fully recognize the rule that the effect of a state constitutional provision, or of any state legislation upon interstate commerce, must be direct, and not merely incidental and unimportant."

And again (page 41): "The vice of the provision lies in the regulation of the rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state." In discussing the question further the court in the hypothetical case states (page 42): "In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and on the other hand the state by such a statute regulates the local rate, but that it has the right to do."

VICE OF CLAIM ASSERTED BY APPELLANT.

In the case at the bar the vice of the claim asserted by appellant is exactly what the Supreme Court pointed out in the *Eubank* case. Instead of it being a case where state is trying to regulate "rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state," it is a case where appellant is trying to do exactly that very thing—just what this court condemned.

It is hardly necessary to point out that if a formula by which a given rate is arrived at makes a regulation of local rates an interference with interstate commerce, then in like manner a regulation by Congress which interferes with the formula would affect local rates, and the argument around which one circles would land one where one started and there could be no control by any authority over any rates.

A RATE IS A DEFINITE CHARGE FOR A WHOLE SERVICE.

The argument or suggestion refutes itself and entirely loses sight of what a rate is. A rate is the "definite charge fixed by the person conducting public employment as the price demanded for performing the service asked. The most salient characteristic of a rate, considered abstractly, is that it is an entirety, the single charge for the whole service performed."

Yet in this case appellant not only seeks to measure a local by a through rate, but does more, *claims absolute control over it irrespective of its reasonableness.*

If its contention is sound, there is no limit to the local changes it might make through the operation of its formula.

The case of *Gulf, Col. & Santa Fe R. R. Co. v. State of Texas*, 204 U. S. 403, previously discussed, completely covers the point raised.

See also:

Southern R. Co. v. Hunt, 42 Ind. App. 90.

State v. Mo. Pacific Ry. Co., 76 Kan. 407.

Coe v. Errol, 116 U. S. 517.

Texas etc. R. R. Co. v. Sabine Tram. Company, 121 S. W. 256.

Augusta Brokerage Co. v. Central of Georgia R. R. Co., 5 Ga. App. 187.

In *State v. Southern Pacific Company,* 23 Ore. 424, the Supreme Court of Oregon sustained an order made by the state railroad commission in establishing a schedule of rates over the lines of the Southern Pacific Company in Oregon.

It is conceded that the state has control over intrastate rates, but it is urged this control can be eliminated by the simple expedient of using a local rate as one of the factors in framing an interstate rate.

TRAFFIC EITHER STATE OR INTERSTATE.

In *Trammel v. Clyde Steamship Company et al.,* 4 I. C. C. Rep. 120-189, the Interstate Commerce Commission says:

> "Traffic is either state or interstate traffic according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is interstate traffic, and when carried over two or more lines it is, by the fact of having been received, forwarded and delivered as one through shipment, transported under a common control, management or arrangement, as the case may be, for continuous carriage or shipment. * * *
>
> "The addition of a local rate to a reasonable through rate in order to fix the through charge to the local station is liable to produce

a relatively unreasonable rate to that station. The difference in situation of the basing and local points in respect of through traffic is not properly measured by the local rate for carriage between them. The reasonableness of the added local, *as a local rate, is not under consideration in a case where the rate complained of is the total charge over different lines.* The total rate or charge for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; *how the rate or charge is made is only material as bearing upon the legality of the aggregate charge, and how any reduction ordered may be accomplished, whether by lowering locals or proportions, is matter for the carriers to determine among themselves.*"

See also:

Wells-Higman Company v. Grand Rapids Indiana Railway Co., 19 I. C. C. Rep. 487.

Dobbs v. L. & N. R. R. Co., 18 I. C. C. Rep. 210.

RIGHT OF CARRIERS TO ADVANCE STATE LOCALS IRRESPECTIVE OF CONTROL OF INTERSTATE COMMERCE COMMISSION OVER THROUGH RATES.

Carriers have a right to advance state local charges irrespective of through rates under the control of the Interstate Commerce Commission. If an order required a through rate not to exceed the sum of the locals, the carriers could advance the locals and thus defeat the order. The only way to overcome this situ-

ation is for the commission to fix the through rate. The commission would have no control over the locals.

Mich. Buggy Co. v. G. R. & I. Ry. Co., 15 I. C. C. Rep. 297.

See also:

Kurtz v. Pa. Co., 16 I. C. C. Rep. 410.

Montgomery Freight Bureau v. Western Railway of Ala., 14 I. C. C. Rep. 150.

Marshall Oil Co. v. C. & N. W. Ry. Co., 14 I. C. C. Rep. 210.

Morgan v. M. K. & T. Ry. Co., 12 I. C. C. Rep. 525, 528.

Brabham v. Atlantic C. L. R. Co., 11 I. C. C. Rep. 464.

Assuming that the rates fixed by the commission are reasonable and lawful (and this is what appellant concedes under the law they must be), appellant's contention would lead this court to say that the law appellant admits must be observed, shall be violated, and the officers of the state be enjoined from complying therewith and the people of the state be deprived of what under the law they are entitled to, at the option of the railroad. The decisions on this question under anything like similar conditions are unanimous against the position taken by the complainant.

Wabash, St. Louis P. R. R. Co. v. Illinois, 118 U. S. 557.

Gulf, Col. & Santa Fe R. Co. v. Texas, 204 U. S. 403.

General Oil Co. v. Crain, 209 U. S. 211.

Ames v. Union Pacific R. Co., 64 Fed. 165-171.

St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 817.

Southern Ry. Co. v. Hunt, 42 Ind. App. 90.

State v. Mo. P. Ry. Co., 76 Kan. 467.

Morgan v. M. K. & T. Ry. Co., 12 I. C. C. Rep. 525-528.

Lincoln Commercial Club v. C. R. I. & P. R. Co., 18 I. C. C. Rep. 319.

Montgomery Freight Bureau v. Western Ry. of Ala., 14 I. C. C. Rep. 150.

Marshall Oil Co. v. C. & N. W. Ry. Co., 14 I. C. C. Rep. 210.

RATES MADE BY STATE AUTHORITY ARE NOT REGARDED AS BINDING BY THE INTERSTATE COMMERCE COMMISSION, "AS A NECESSARY MEASURE OF THE INTERSTATE RATE."

Saunders v. Southern Express Co., 18 I. C. C. Rep. 415, 421; *Hope Cotton Oil Co. v. T. & P. R. Co.*, 12 I. C. C. Rep. 265, 269.

And as has been said "conversely under these decisions it is difficult to see why the state should be bound to adopt interstate rates; for, although the federal power is supreme respecting interstate rates, that would leave the state with no power at all in regard to local rates."

Yet that is exactly what is being attempted here. The facts and reasoning of the court in *Mo. Pac. R. Co. v. Kansas*, 216 U. S. 262, are apt and in point.

In discussing the effect of the order complained of upon interstate commerce the court (at p. 283) said: "But this simply confounds the distinction between state control over local traffic and federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation." Again at page 284:

> "The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when, in fact, the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation." * * * And again: "But under the hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

It thus appears under this decision this order is not a direct interference with interstate commerce, but indirect, and only then at the option of the railroad com-

pany, which is not compelled to use any particular formula in arriving at a through rate, or use the local as any part of it.

It is suggested that other roads terminate at Portland and interstate traffic can move over them and thence on a local rate to destination, and appellant compelled to meet the competition. This certainly furnishes no reason for maintaining unreasonable local state rates, either to enable appellant to maintain higher rates, to better control the traffic or to secure greater revenue. On this hypothesis, on the through rate the shipper could secure relief through the Interstate Commerce Commission which commission does not concern itself either with local rates or divisions, but with the rate as an entirety, while on local traffic the shipper would be powerless, with no forum to appeal to.

THE PLEA IS UNSOUND AND SOPHISTICAL.

From any view point one may examine it the proposition is sophistical and unsound.

The court is dealing with a case wherein reasonable rates have been fixed for state commerce and in the manner provided by law. Other than mere allegations of opinion, there is not a statement of fact in the bill to show the rates fixed for the service rendered are not just and reasonable. The court is asked to set aside this order and enjoin the collection of reasonable rates for state traffic because of an alleged interference with interstate commerce as above outlined. The court is asked to declare a lawful rate unenforceable and to de-

ere that unlawful rates can be exacted on all state commerce because of an alleged interference with some interstate commerce.

COMPETITIVE LINES OF TRANSPORTATION.

There are other lines of transportation than appellant's by sea from California to Portland and by both rail and sea from points of eastern origin to Portland.

This competition might very naturally result in competitive rates to Portland, but because appellant is one of the competitors and names through rates, with the local rate in Oregon as one of the factors, is the state to be deprived of the right to enjoy reasonable rates on domestic traffic? Is a shipper, who chooses to employ a competing line to Portland, to be deprived of a reasonable rate to distribute goods from his stock in trade? Are the public to be deprived in a measure of the benefits of water or other competition by the maintenance of unreasonable local rates because of it?

As illustrative of how this would be the effect of appellant's contention, note the method used in naming rates from California points to points in Oregon. The rate is made by adding certain "arbitraries" or local rates to Portland to the local rates from Portland.

If the "arbitraries" combined with local rates out of Portland make a reasonable through interstate rate, under appellant's views no authority has power to enquire into the reasonableness of the local rate out of Portland, as that would interfere with interstate commerce if changed.

The controlled steamship line will not complain about its divisions and the through rate being reasonable, no authority can interfere.

By making the water "arbitrary" or rate to Portland low enough competition is discouraged, and with the power to regulate the local rates eliminated the public is without protection and the law requiring reasonable rates within the state is a dead letter.

THE CIRCUIT COURT'S DISCUSSION.

In discussing appellant's theory of the alleged interference with interstate commerce by changing the local rates on intrastate traffic, the court said (Rec. 66-67):

> "It seems to be premised by counsel for complainant that the commission's order does not relate to purely internal commerce originating within the State of Oregon, or such commerce as may be appropriately designated intrastate commerce. If this premise be admitted, it must be at once conceded that the state commission has attempted to act beyond the scope of its authority. Counsel's premise is at fault, however. As has been previously shown, the commission presumptively has acted within the scope of its authority, which was to prescribe rates applicable to the transportation of intrastate commerce only. But beyond this, it seems to be thought that if a state tariff affects an interstate tariff in the slightest measure, though incidentally, it must give way to the latter, and hence is void and inoperative. For instance, it is alleged that if the state commission's rate becomes effective many persons will ship their commerce from without the state to Portland, and then reship to points east of The Dalles; or, in another way, wool will be shipped to Portland from points east of The Dalles, and thence east by the transcontinental

rates, and thus the complainant will be compelled to re-establish its rates in order to retain its through haul from Eastern Oregon points. In other words, interstate traffic will thereby be interfered with, disturbed, and disarranged.

"It is, and always will be, a difficult question to determine as to when and what commerce should be classified as interstate, and when and what should be classified as intrastate. The question depends largely upon the facts and circumstances attending each case as it arises. There can be no doubt that commerce originating within the state and carried to some other point within the state is intrastate commerce. So it is of commerce originating within the state and transported, by continuous carriage, from within to some point without the state, or originating without the state and carried within—that is to be classified as interstate commerce. But when intrastate becomes interstate commerce and *vice versa*, is an inquiry involving nice distinctions, perhaps. But we are not concerned with that at the present time. We are dealing with the distinct question of the supposed conflict between the regulation of interstate and intrastate commerce. Let us take a commodity, for instance, manufactured in Portland. Let it be agricultural implements. The state has a perfect and undoubted right to regulate the tariff for transportation of such commodity by rail to any part of the state from Portland, so that the tariff be reasonable; and I may say to any point on complainant's lines, within the state, east of The Dalles. If that regulation interferes with present tariffs for interstate

transportation of the same commodity from common points east of the Mississippi or Missouri Rivers to points on complainant's lines east of The Dalles, who can say nay? But to go a step farther: The same commodity may be shipped to Portland from without the state, and put in common stock. When the commodity thus comes to rest in the state, and is sold by the dealer for transportation from Portland to some other point within the state, it is as much intrastate commerce as the case just put, and the state may, with equal authority, regulate the freight tariff. This is a condition of which complaint is made lest it be that dealers will take advantage of the local rate, and, selling to customers within the state, ship first to Portland at the transcontinental rate, and thence out to the interior at the local rate. A shipment from the East, via Portland, to a point within the interior of the state, would be interstate commerce; but whether such a shipment could be made to take the classification of interstate commerce by shipment to Portland in the name of the dealer, and then of intrastate classification by the dealer billing it out of Portland again to his patron in the interior, is another question, which we need not decide. It remains clear that whenever the commodity partakes of the characteristic of intrastate commerce, the state has the right to fix the rates of tariff for its transportation wholly within the state."

EFFECT ON WOOL RATES.

The allegation as to the effect on the wool rates is particularly illuminating as showing the extent to which appellant would go in the application of its doctrine.

The tariffs in evidence show the only rates applicable to wool on intrastate movement are found in classes 2 and 3, next to the first class, the classificiations and carrying the highest rates. There are no state carload rates.

Within the state, under the tariff the rate per hundred on a carload is no less per hundred than on a single sack. It appears from the complaint on account of ocean competition at Portland a commodity rate is made from Portland to eastern points of destination of $1 per hundred. From all interior points the through rates by the tariff to eastern points are generally, if not always, equal to the combination of the local rate to Portland plus the $1 rate from Portland. Therefore the more distant the point from Portland, the higher the rate, both to Portland and the the eastern point, and necessarily the greater inducement to maintain very high locals.

Appellant alleges that if the local rates are reduced to Portland, it will either have to reduce its through rates from the interior points to eastern points, or the wool will move first to Portland and then back. Thus it is claimed interstate commerce is interfered with.

In other words, to deprive the community of the benefit of water competition, to enable appellant to maintain a rate to New York and Boston thus constructed the shippers of wool and manufacturers and users of woolen garments within the state of Oregon are to be condemned to pay excessive rates on all local shipments of wool.

Astounding as this statement may appear, it is in the record and as one of the facts relied on to deprive the state of any control over the state rates or local shippers of any tribunal to which to appeal for redress. On this point the Court below said (Rec. 67-68):

> "Take the case of wool again, purchased in Eastern Oregon. If that be shipped to a buyer in Portland, why is it not intrastate commerce? That same wool, after being thus shipped to Portland, if it be that such buyer subsequently sells to a buyer in Boston and ships to him at that place, would become interstate commerce. If bought in Eastern Oregon for transportation to Boston by way of Portland, the local state rate could not apply, because that would partake of the character of interstate commerce."

In argument below it was asserted by appellant that the through rate could not exceed the sum of the locals without creating an unjust discrimination. In this connection it will be observed that the rates referred to between Eastern Oregon points and Portland are not local intermediate rates to eastern points, but are rates for a back haul over a line of railroad.

BAKER CITY SITUATION—RATE RELATION.

Paragraph XXII of the Bill of Complaint, reduced to a statement means that, under the rates as constructed, Baker City merchants can sell to a certain distance from Baker City and Portland merchants a certain distance from Portland, so that a change in the rates disturbs the relationship and under the order Portland merchants can sell further as against Baker

City merchants than they could under the arrangement and tariffs as fixed by appellant. Therefore the order attempts to regulate movement as well as rates in interstate traffic. Nothing is alleged in this paragraph as to the reasonableness or unreasonableness of the rates.

It will be noted that the logic of appellant's contention has now driven it to the point of asserting that a mere change in relationship or a change that will affect movement is an interference with interstate commerce forbidden by law, thus putting it in the control of the carrier through its power to name rates, to say who and who shall not do business, and in what territory one can trade. In this connection we point out that this is the only allegation in the bill which even indirectly alleges any discrimination is effected by the enforcement of the order. This, it is obvious, is not a discrimination as against interstate traffic, and can have no good result.

EFFECT ON APPELLANT'S THROUGH RATES BY THE USE OF COMPETING LINES.

Under paragraph XXIII, it appears the Northern Pacific Railway with its connections forms a route over which freight is moved from eastern points to Portland at the same rate as over the lines of appellant and its connections. That if the rates ordered by the state commission became effective, freight to points east of The Dalles, on appellant's lines would move via the Northern Pacific lines to Portland and thence on local rates to destination, unless appellant reduced all its rates to points on its lines east of The Dalles to an

amount equal to or less than the combination of the terminal or Portland rate plus the local rates fixed by the order. That if it did not meet this rate large quantities of interstate traffic would be diverted.

Here the allegation of interference with interstate commerce is based on the fact that local rates must not be disturbed; otherwise competitors will secure business unless the competition is met.

The discussion of these two propositions by the Court below is both cogent and pertinent (Rec. 69-70):

> "The Baker City situation is relied upon as a demonstration that the local or state rates, if approved, will unsettle interstate regulation, or rather will disturb the situation as it now stands. That city is engaged in a jobbing business, and is importing merchandise from points east of the Missouri River and in California, which it sells to customers within a certain radius of territory in job lots. Under tariff U. P. I. C. C. No. 1578 and No. L-525, the Baker City jobbers pay a freight rate from point of origin in the East or in California generally equal to the carload rate to Portland plus the carload rate from Portland to Baker City, and are required to pay the less than carload rate from Baker City to points of distribution. Now, the Portland jobber is required to pay the carload rate from point of origin in the East and in California to Portland and the less than carload rate from Portland to point of distribution. So it is, says the complainant, that the profit of the Baker City jobber and his ability to sell merchandise depend upon the difference between the car-

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load rate out of Portland and the less than carload rate from Portland to the point of distribution. It is further claimed that the rates established by the commission's order in comparison with those fixed by L-525 greatly decrease the difference between the carload rates and the less than carload rates from Portland, 'so that interstate traffic originating in the East and in California, and so in the past distributed from Portland and from Baker City, respectively, can only be distributed advantageously, and with profit, from Portland to all points in Eastern Oregon,' and, therefore, that the commission's order attempts to regulate the movement of, as well as the rate charged upon interstate commerce. *This is only an illustration of how rate-making may destroy and build up jobbing centers, considering the facts stated to be true, and the deduction legitimate. But transportation companies do not have, nor can they longer claim, a monopoly upon rate-making. Suppose, however, Portland was able to supply from home production all the different kinds of merchandise that the Baker City jobber wanted in his trade. A reasonable freight rate made by the state for the transportation of the merchandise to Baker City and interior points would be perfectly legitimate. If that rate enabled Portland, through its home produced merchandise to displace the business of the jobber in Baker City dealing in like merchandise imported from other states, how could it be said that the state freight tariff was unconstitutional, and therefore unlawful? The state rate does not apply to interstate commerce; nor was it designed so to apply. But if the Portland merchant imports his goods*

and then jobs them from Portland, the result will be the same as if he were dealing in home products, because the importations will have become domesticated. If that method of dealing constitutes or induces a change in the movement of interstate commerce, it is the thing that the merchant will or will not do as his profits in business may impel him. The movement of his merchandise when it goes out of Portland to the interior of the state is intrastate. I am not speaking now of goods imported to Portland in original packages, and then shipped out to points in the interior of the state in like packages as shipped to Portland, because I am not now called upon to determine whether such character of movement would constitute interstate traffic. It will be time enough to decide such case when it arises. I have reference to such merchandise as may be first imported to Portland, and then, going into a wholesale dealer's common stock, is wholesaled or jobbed out to customers in the interior of the state—such a movement of merchandise from Portland to the interior of the state as would constitute intrastate shipment pure and simple. If this kind of traffic, with the freight rate imposed upon it by the state, is of such proportions and such percentage as to affect trade in interstate merchandise, and therefore render it advantageous to interstate lines to change their rates so as to control the trade in certain channels, that is not a trenching upon the exclusive authority of Congress to regulate interstate commerce. The interference is but incidental, and flows from a perfectly legitimate regulation of freight rates by the state, and an altogether natural move-

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ment of trade; and the condition is absolutely beyond the control of Congress. That I may be fully understood, I will allude to another incident. Counsel for complainant says:

"'If the Northern Pacific Railway should receive at Tacoma freight destined to a point in the State of Oregon east of The Dalles, such merchandise would be moved from Portland to the points east of The Dalles over the lines of the complainant, and the rates charged therefor would be the class rates fixed by Tariff No. L-525 filed with the Interstate Commerce Commission as required by the interstate commerce act. By the order sought to be set aside the complainant would be required to charge not the rates fixed by Tariff L-525, but the rates established by the order of the commission.'

"In this statement counsel is mistaken. The shipment would constitute an interstate shipment, and L-525 would prevail as against the state rate. *So, if it be that the local state rates, as fixed and regulated by the State Railroad Commission on these commodities, unsettle in some way previously fixed transcontinental or interstate rates, that circumstance does not render the state rates invalid as an interference with interstate commerce. Let it be supposed that the state was the precursor in making rates for the transportation of purely intrastate commerce, there could then, at that juncture, be no conflict. Could it be contended that the state rate was invalid because connecting railroads might desire to establish a transcontinental rate in combination with a local rate, also of their own making, which would conflict with the state rate? If so, the fixing*

of a state rate would be a precarious and evanescent thing, to be dissipated at the caprice of the transportation companies, and the general government would usurp, in practical effect, the functions of the state government in the regulation of intrastate commerce. Such was not the purpose of the framers of the federal constitution. Nor was it the purpose of Congress itself in the adoption of the interstate commerce act, wherein was recognized, as has been noted before, the right of the state to regulate commerce wholly within its borders. The bill, therefore, in my opinion, states nothing that renders either the State Railroad Commission act or the order of the commission in conflict with the commerce clause of the federal constitution. This conclusion is borne out by the decisions of the Supreme Court." (Italics ours).

LATE CASES PASSING ON ALLEGED INTERFERENCE WITH INTERSTATE COMMERCE BY ORDERS OF STATE AUTHORITIES FIXING STATE RATES.

Of late, as is evidenced by the records in this court, there is internal evidence that a new line of attack upon railroad regulation has been formed. Originally the attack was centered upon the power of the Interstate Commerce Commission to name and enforce reasonable rates. Now it appears in two forms, first, to have established as a principle that rates made by authority, national or state, must be fixed on a basis that will yield a reasonable net return on the reproductive value of a railroad based upon impossible and imaginary conditions.

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This question is not in this case.

Second, to have established as a principle under which the naming of a rate by state authority that in any way conflicts or interferes with an interstate rate, is an unlawful interference with interstate commerce.

So far has this fiction been extended that in this case a change in relationship of state and interstate rates, if caused by change in intrastate rates, is adjudged to be an unlawful interference. A change in a rate that may affect the movement of freight is also alleged to be an unlawful interference.

It is submitted that the facts, as shown by the records, justify the inference above made for in nearly all, if not all, the circuit's suits predicated on this theory are pending or are now on appeal in this court or in process of being appealed.

The reason for this attack is apparent and the result if successful equally apparent.

PURPOSE OF ATTACK TO ELIMINATE STATE COMMERCE FROM ANY REGULATIVE AUTHORITY.

It is evident Congress cannot regulate state commerce, the state cannot regulate interstate commerce; therefore, if the railroads can maintain their theory, that any rate fixed by a state which indirectly affects an interstate rate is an unconstitutional interference with interstate commerce, the regulation of all state commerce is at an end. There is no difficulty whatever in making any interstate rate by tariff rules include a state rate, over which under this theory no authority would have control, and this, and this alone, is the reason for this latest form of attack in state regulation.

In *Mo. Pac. R. Co. v. Kansas*, 216 U. S. 262, the court is discussing a question involving this same principle, said (page 283):

> "To sustain the proposition would require it to be held that the local traffic of the road was free from all government regulation."

In *Louisville & N. R. Co. v. Siler*, 186 Fed. 176, at page 200, the court speaking to the identical question said:

> "The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that, so far as rate-making is concerned, the State Railroad Commission would have no reason to exist, and state regulation of state rates would become simply historic."

In *Re Arkansas Rate Cases*, 187 Fed. 209, 222, the court says:

> "If complainant's contention is correct, transportation companies, so far as the exclusively internal commerce of a state is concerned, are beyond all control, either from the state or national government; for, as determined in *Gibbons v. Ogden*, *supra*, the constitution excluded that class of commerce from the powers vested in Congress by the commerce clause, and, as all state rates indirectly affect interstate rates, they are, if complainant's contention is right, also void. See also on this point the *Employers' Liability Cases*, 207 U. S. 463, 493.

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"The result of such a construction would be that the states do not possess one of the most important powers inherent in every government. The adoption of such a construction by the courts would be justifiable only if any other would do violence to a plain provision of the national constitution or principles of law so firmly established by previous decisions of the highest court of the land that there is no longer room for construction. In the language of Mr. Justice Peckham in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 231:

"'If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon that subject or prohibit such contracts. This cannot be the case.'"

AUTHORITIES.

The question before the court has been passed on directly in a number of cases, and in all but one the power of the state was upheld.

In the case of *State v. Northern Pacific Ry. Co.* (Sup. Ct. N. Dak.), 120 N. W. 869, the judgment in which was affirmed by the Supreme Court of the United States in *Northern Pac. Ry. Co. v. North Dakota*, 216 U. S. 579, the state court held that a state statute fixing coal rates between points within the state, was not a regulation of interstate commerce as applied to interstate lines. The court said:

"It is finally urged by defendant's counsel that the act in question violates the interstate commerce clause of the federal constitution. Their argument is necessarily predicated upon

the assumption that state regulation of local rates on interstate lines amounts to an interference with interstate commerce, as the act assailed, upon its face, merely purports to establish maximum rates for transporting coal in carload lots between points within the state. This question is not open to debate, as the court of last resort in this country has repeatedly held adversely to counsel's contention."

After quoting from *L. & N. R. Co. v. Kentucky*, 183 U. S. 503, the court said further:

"It is but fair to counsel for defendant to state that they concede that, up to this time, the decisions of the United States Supreme Court on this point are uniformly opposed to their contention. Even if we were disposed to entertain the views expressed by Judge Lochren in *Perkins v. Northern Pacific R. Co.* (*C. C.*), 155 Fed. 453, which we are not, we should feel it our duty, as did Judge Lochren, to yield to the judicial utterances of the final arbiter on this question."

That question was not discussed by the Supreme Court of the United States in affirming the judgment, but the court said that the mere fact that the state court had held that the statute applied only to transportation wholly within the borders of the state disposed of the objection that the statute was a regulation of interstate commerce.

The case of *Woodside v. Tonopah & G. R. Co. et al.*, 184 Fed. 352, was heard by Judges Morrow, Farrington and Van Fleet.

We quote from the syllabus:

> "A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic."

The case of *Louisville & N. R. Co. v. Siler et al.*, 186 Fed. 176, is very illuminating. In this case the court discussed due process of law, deprivation of property, right of review, state regulation, penalties, impairment of contracts under rights given by a railroad charter, jurisdiction of federal courts, and indirect effect on interstate rates through state regulation of rates.

In passing upon the questions, the court held as did the court below in this case, and it is now pending here on appeal.

The court, *inter alia*, held that the fact that a railroad company in making its through rates has taken the sum of the local rates in each state in order to make the through rate does not remove such local rates from the jurisdiction of the state for the purpose of regulation, nor does the fact that a reduction of local rates by the state may incidentally place the company under the business necessity of reducing its interstate rates affect the legality of such reduction.

In re Arkansas Rate Cases, 187 Fed. 290, the same question was presented and discussed at length by the court and the various decisions analyzed. The court's conclusions were the same as in the cases cited.

On this point we quote from the syllabus:

> "Rates established by a state for the intrastate carriage of freight or passengers necessarily indirectly affect the interstate rates; but that fact does not render the establishment of such rates unconstitutional, as an interference with interstate commerce."

In the case of *Southern Pacific Co. et al. v. Campbell* (U. S. Cir. Ct. Dist. of Oregon, July 3, 1911), the precise question as that presented in the the case at bar was submitted, and the court, by Bean, J., announced its full concurrence with the views as expressed in the opinion of Judge Wolverton in the case at bar.

Shepard v. Northern Pac. Ry. Co., 184 Fed. 785, is the only case lending any countenance to appellant's contention.

We do not deem it necessary to analyze this case. What is believed to be the law as settled by this court has already been submitted. The court, however, was careful to say that the case was decided on the particular facts. At page 797 of the opinion the court says:

> "The reduction of local rates does not interfere with interstate rates 'as a matter of law,' yet it may do so as a matter of fact. Whether or not the general and sweeping reductions in local rates in Minnesota necessarily interfere with interstate rates and interstate commerce is in this case, as it must be in every case, a question of fact. The facts which determine that question in this case have been set forth in this opinion at great length, because it is upon them, and not upon legal inferences, that the answer to the question, whether or not the effect of the necessary operation of the

acts and orders challenged is substantially to burden interstate commerce, now rests. * * * The opinion of Mr. Justice Brewer in the *Ames Case* is inapplicable to the cases in hand because no such array of condemnatory facts was ever submitted to him in that case, and it is perhaps not too much to say that no case has been found in the books in which any such proof of the unavoidable effect of general reductions of intrastate rates to substantially burden and directly regulate interstate commerce has ever been presented."

The facts as stated in the opinion are so different from those in the case at bar that it readily distinguishes itself.

TIME WITHIN WHICH INTERSTATE RATE CAN BE CHANGED.

Under paragraph XIX (p. 14 Rec.) it is alleged "no interstate rate contained in any of the interstate tariffs hereinbefore mentioned can be changed without giving of thirty days' notice."

It is also alleged that under the terms of the order the rates prescribed shall be put into effect within twenty days from the date of service, and that, therefore, in order to comply with the terms and conditions of the order, appellant would be compelled to violate the act of Congress and regulations promulgated by the Interstate Commerce Commission, and in this particular the order is an attempt to regulate commerce and is void.

This paragraph, doubtless through inadvertence, does not state the law correctly.

First. The act of Congress, while providing for the giving of thirty days' notice, further provides "that

the commission may in its discretion and for good cause shown allow changes upon less than the notice herein specified," etc. (Act to Regulate Commerce, Sec. 6).

Second. Rule 14 of the Interstate Commerce Commission provides for permitting changes on short notice.

Third. Rule 56 of the Interstate Commerce Commission provides for changes, where a joint rate or rate by a given route between any points is higher than the sum of the locals between the same points, on one day's notice.

Therefore, the allegations contained in this paragraph, which on their face are at variance with the law and the facts, cannot state a cause of suit or be the basis of a charge of an attempt to regulate interstate commerce by the state commission of Oregon.

It might be suggested further that Tariff L-[illegible] contains both state and interstate rates, and the change in the local rates is not controlled by the rules or regulations of the Interstate Commerce Commission or the act to regulate commerce.

A local rate within a state may be changed without the necessity for such notice as is required by the act to regulate commerce of a change in an interstate rate.

Morgan v. M. K. & T. Ry. Co., 12 I. C. C. Rep. 525-528.

POSSIBLE CHANGES OF RATES IN THE STATE OF WASHINGTON BY STATE AUTHORITIES.

A hypothetical question is presented by paragraph XXI (Rec. 15) wherein it is suggested that, if the state of Washington should establish the same rates in Wash-

ington as those provided in the order in question, then the interstate rate charged by appellant from points in Oregon to points in Washington "could not be lawfully or practically greater than the sum of the respective local rates so attempted to be established by the states of Oregon and Washington, and therefore the said interstate rate would be wholly and necessarily established by the said respective states to the exclusion of and contrary to the sole and exclusive control, which should properly be exercised thereover by Congress under the constitution of the United States and by the Interstate Commerce Commission pursuant to the act to regulate commerce hereinbefore mentioned."

This paragraph is argumentative, based upon a hypothesis and a presumption the law does not recognize and upon a statement that is not in exact accordance with the law.

Under the law the presumption that attaches to rates prescribed by commissions, is that they are reasonable. Any rate, state or interstate, that is unreasonable would be unlawful and therefore could not be sustained. The court will presume that rates established by lawful authority are reasonable. Irrespective of this presumption it would be difficult to see, generally speaking, why the sum of two reasonable local rates would not make a reasonable through rate over the same line, in the same direction, for the same distance. Particularly is this the case when, generally speaking, a through rate is lower than the sum of the locals, a practice which has received the approval of this court.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257-262.

While the Interstate Commerce Commission has announced that, generally speaking, its policy would be to consider the through rate or fare, which is higher than the sum of the locals between the same points as prima *facie* reasonable, and the burden of proof would be upon the carrier to defend such higher through rate or fare, at the same time it is frequently held that the sum of the locals does not necessarily or lawfully fix the through rate, nor would such rate be necessarily established by the sum of the locals.

Brabham v. Atlanta C. L. R. Co. et al., 11 I. C. C. Rep. 464.

Morgan v. M. K. & T. Ry. Co., 12 I. C. C. Rep. 525-528.

Montgomery Freight Bureau v. West. Ry. of Ala., 14 I. C. C. Rep. 150.

Marshall Oil Co. v. C. & N. W., 14 I. C. C. Rep. 210.

We, therefore, submit that such allegations as the foregoing do not state a cause of suit or present any issue to be tried.

OBJECT OF SUIT.

It is manifest from the bill of appellant, the meagerness of fact therein stated, the general character of the allegations as to the unreasonableness of the rates

that the effect on the revenue of the appellant is not the moving cause of this suit. Its real purpose is:

First. To make the state railroad commission a "useless piece of machinery," to eliminate the power of the state directly or through an administrative body to fix rates or control or regulate railroads within the state.

Second. To eliminate its power to enforce any order it may make, so that any action taken by it would be merely advisory; and, if an order did not suit the purpose or convenience of the carrier, or was objected to by it, then and without question and as a matter of right, to have a court pass upon the mere reasonableness of an order before it becomes effective.

In other words, appellant's purpose is to make the courts, instead of the commission, the administrative body to carry into effect the legislative will.

The distinction between the action of a court, what it may consider and its powers, and that of a legislature or an administrative body, and what they may consider and their powers, is fundamental and vital, and the lines of demarcation are clearly marked and always recognised.

Courts cannot prescribe rates for the future. Moreover it is extremely difficult if not impossible, under judicial procedure and the practice and rules of law applicable to evidence, for a court to investigate a rate question or to determine the mere reasonableness of a rate in all of its bearings. Wherever it has been tried it has proven a failure and been abandoned, and all experience shows, as has been repeatedly found by the

courts, that the only successful method of the regulation of public service corporations is through administrative bodies to carry out the legislative will.

We submit the following principles applicable to the issues in the case before the court, are settled both on principle and authority:

1. Congress has power to regulate and control interstate commerce and as to that commerce its authority is supreme.

2. The state has power to regulate and control intrastate commerce and as to that its authority is supreme.

3. The interference by the state with interstate commerce to be unlawful must be direct, and not the merely incidental effect of enforcing the police power of the state.

4. When the carrier uses a local rate as a factor in making a through rate it does so knowing that all such local rates are under the control of the state and subject to its regulation. Nor does the fact that a reduction of local rates by the state may incidentally place the company under the business necessity of reducing its interstate rates affect the legality of such reduction.

5. The Interstate Commerce Commission has no control over state commerce. If the state cannot control it we have a condition whereby a very large portion of the commerce of the United States will be under no control and beyond restraint and the states deprived of a power inherent in every sovereignty.

6. A judicial inquiry is limited to ascertaining whether or not a rate is confiscatory, not whether it is reasonable in the ordinary meaning of the word.

7. Confiscation cannot be predicated of a particular rate or group of rates. It must be shown that the entire body of rates within a state are so unjustly low as to deprive the carrier of reward, and amount to taking of the property.

8. If rates are so unreasonably low as to amount to confiscation the court may enjoin the operation of the order fixing such rates. The burden is upon the carrier to make this appear clearly and beyond doubt.

9. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway than the services rendered by it are reasonably worth.

10. The public interest is paramount and a carrier is not entitled to any given per cent on its investment, nor to any profit, if in order to secure them excessive rates are necessary.

11. Whether particular rates under all the circumstances are just and reasonable as between the carrier, the shipper and the public is a legislative, not a judicial, function.

12. Where a rate is attacked general allegations of unreasonableness or confiscation state no cause of suit. Facts must be alleged from which the court can arrive at an independent conclusion.

The order affects and is intended to affect intrastate rates only. What is state commerce has been clearly defined by this court. Any other class of traffic cannot be affected. This court will not indulge in the presumption that the state of Oregon will interfere or

attempt to interfere with interstate commerce. The only difficulty even under appellant's contention arises from its own conduct.

The interference alleged is the result of the voluntary use of local rates as such in arriving at the total of through rates. This could be easily remedied without an appeal to the chancellor, without injunctions or appeals to courts at all.

No charges of discrimination are made, no figures submitted or facts stated that give the court the slightest intimation as to the effect the change in rates will have on the earnings of the appellant if any.

The state of Oregon has nothing whatever to gain by any course except that of entire fairness and frankness, not only in its dealings with the court, but with all of its citizens.

If it had not been felt that the bill of complaint stated no facts constituting a cause of suit, and that such issues as are presented are of law only, an answer would have been made to the bill.

It will not be assumed that the railroad commission of Oregon would misuse its great powers or treat unfairly in any respect any citizen, individual or corporate.

We have discussed the law and the facts at length. We have been impelled to do this by the consciousness that a great principle is at stake, a principle as old as the constitution itself—the right of the respective states to control and regulate their domestic commerce.

It is perfectly apparent that, if the contention of appellant is sustained, the carriers would be released as

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to their local rates from all government regulation, and, as was stated by the court in *Louisville & N. R. Co. v. Siler, supra*:

> "The inevitable effect would be that, so far as rate making is concerned, the state railroad commission would have no reason to exist, and state regulation of state rates would become simply historic."

It is not to be wondered, therefore, before accepting such a doctrine, the court desired to recall the views of the Supreme Court "touching the power of the state to regulate commerce carried on exclusively within its borders."

The rule announced in *Gibbons v. Ogden*, defining the meaning of the words of the commerce clause of the constitution, has been recognized and accepted as the law ever since announced by Chief Justice Marshall:

> "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state or between different parts of the same state, and which does not extend to or affect other states."

As stated this doctrine has been always accepted by the Supreme Court of the United States, and in the late case of *Howard v. Ill.*, 207 U. S. 463, 502, Mr. Justice White, after stating in words which cannot be misunderstood, that the foregoing doctrine had always been accepted, said:

> "It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the

limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

The foregoing expression is as appropriate to the facts in this case as in the one to which it was directly applied.

It is now sought by indirection to nullify the power of the state and a power inherent in every government. This attack is the more dangerous because more insidious and less apparent than if made directly. However, it will be, if successful, none the less effective.

It is altogether beside the question to say that it might or might not be better if all commerce, both state and national, was under federal control. It is doubtless true that two sovereignties operating in the same territory and affecting the same persons and property may at times interfere the one with the other. This results from the nature of our government and the limitation of powers imposed by the Constitution. To be an unlawful interference, however, it must be one that is true and actual and not merely incidental or imaginary.

The Act to Regulate Commerce expressly limits its application to interstate commerce.

The Act to regulate commerce in Oregon expressly limits its application to intrastate commerce.

The laws are carefully worded to the end that each sovereignty will keep within its own sphere and not interfere one with the other, and as the power of regu-

tion over state commerce is vested in each state, it must be exercised by it or it could not be exercised by any authority.

As has been truly stated "the conflict is not between state and federal authority, but between the constitution and laws of both sovereignties and the practices of the railroad companies."

CONSTITUTIONALITY OF THE ACT OF THE LEGISLATIVE ASSEMBLY OF OREGON CREATING THE RAILROAD COMMISSION.

If the railroad commission act violates the constitution of the state of Oregon or the Constitution of the United States, discussion of other assignments of errors and points will be unnecessary. We will therefore next discuss these questions.

CONSTITUTIONALITY OF ACT ASSUMED.

Courts will not for slight reasons, or even in cases of doubt declare a law unconstitutional. It is never assumed the legislative branch of the government enacts unconstitutional measures, nor will a court declare an entire act unconstitutional unless its repugnancy to the constitution is clearly apparent. Even if there is doubt as to the constitutionality of an act all doubt must be resolved in its favor.

Fletcher v. *Peck*, 6 Cranch 87, 128.
United States v. *Coombs*, 12 Pet. 72, 76.
Sinking Fund Cases, 99 U. S. 700, 718.
Nicol v. *Ames*, 173 U. S. 509, 514.
Smithfield v. *Steenekon*, 192 U. S. 470, 492.

In *Interstate, etc., Ry. Co. v. Massachusetts*, 207 U. S. 79, at page 88, Mr. Justice Holmes, speaking for the Court, says:

> "It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained."

DOES THE ACT VIOLATE SECTION 1, ARTICLE III OF THE CONSTITUTION OF OREGON?

> Article III, Section 1. "The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

The Supreme Court of Oregon has passed, directly and unequivocally, upon this precise constitutional question, in *State v. Corvallis & Eastern R. Co.*, decided September 19, 1911. This was an appeal from a judgment imposing a penalty for failure to comply with an order of the Railroad Commission of Oregon for the erection of a depot and the installation of an agent. Defendant railroad demurred, on the ground, among others, that the railroad commission act unconstitutionally intermingled the several powers of government. The Supreme Court of Oregon held the act did not contravene the provisions of Act III, Sec. 1, of the Oregon Constitution. This case being just decided has not been reported. If not reported at date of argument, a certified copy of opinion will be filed with clerk of this court.

Such a construction of the state constitution and statute is binding upon this Court.

Jack v. Kansas, 199 U. S. 372, 379.

Smiley v. Kansas, 196 U. S. 447, 454-5.

Merchants' Bank v. Pennsylvania, 167 U. S. 461, 462.

Encyc. of U. S. Sup. Ct. Rep. Vol. 4, p. 1068, note 691, citing numerous cases.

Other cases from the Oregon Supreme Court sustaining orders of the present railroad commission:

Portland Ry. L. & P. Co. v. Railroad Commission, 105 Pac. 709.

Id. v. Id., 105 Pac. 715.

Rehearing in above denied, 109 Pac. 273.

Martin v. Oregon R. & N. Co., 118 Pac. 17.

This question was also considered in the United States Circuit Court for the District of Oregon, in *Southern Pac. Co. v. Campbell*, decided July 3, 1911, and not yet reported in the Federal Reporter.

It is worthy of consideration that Judge Wolverton (who decided the case now at bar) and Judge Bean, who decided *Southern Pacific Co. v. Campbell*, were both members of the Supreme Court of Oregon for many years.

Under a former railroad commission act, the authority of the commission was sustained.

State v. Southern Pacific Co., 23 Ore. 424.

In every state having a constitutional provision similar to that quoted above, where this question has been presented to its Supreme Court, the railroad commission act has been sustained as against the claim that the powers of government were unconstitutionally intermingled.

Florida—

Railroad Commissioners v. Pensacola & A. R. Co., 24 Fla. 417, 472.

Storrs v. Pensacola & A. R. Co., 29 Fla. 617, [illegible]

Georgia—

Georgia R. v. Smith, 70 Ga. 694, 71 Ga. [illegible]

Indiana—

Southern I. Ry. Co. v. Hunt, 42 Ind. App. [illegible]

Southern I. Ry. Co. v. Railroad Commission, [illegible] Ind. 118.

Chicago I. & L. R. Co. v. Railroad Commission, 95 N. E. (Ind. Sup. Ct.) 864.

Kansas—

State v. Missouri P. R. Co., 76 Kans. 467, [illegible]

Michigan—

Michigan C. R. Co. v. Mich. Railroad Commission, 160 Mich. 355, 366, citing, approving as "well considered," and quoting from O. R. & N. Co. v. Campbell, 173 Fed. 957, the case at bar.

Minnesota—

State v. Chicago, M. & St. P. R. Co., 88 Minn. 281.

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State v. Great Northern Ry. Co., 100 Minn. 445, 476.

Mississippi—

Stone v. Yazoo & M. V. R. Co., 62 Miss. 607, 645, *affirmed, Railroad Commission Cases*, 116 U. S. 307.

Nebraska—

In re Railroad Commission, 16 Neb. 670.

New York—

Trustees, etc., v. Saratoga Gas Co., 191 N. Y. 128, 181.

North Carolina—

Atlantic Ex. Co. v. Wilmington R. C., 111 N. C. 468, 472.

Wisconsin—

Minneapolis, St. P. & S. St. M. R. Co. v. Railroad Commission, 136 Wis. 146.

Washington—

State v. Railroad Commission, 52 Wash. 17, 32.
id. v. id., 52 Wash. 33.

Other state cases might be cited, but the foregoing are sufficient to show the universal trend of judicial thought and expression so far as the state courts are concerned.

DECISIONS BY FEDERAL COURTS.

The law as announced by the federal courts is uniform and in harmony with that announced by the state courts.

In *Atlantic Coast Line v. N. C. Commission*, [illegible] U. S. 1, Mr. Chief Justice White said (page 19):

> "The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

The constitutionality of state statutes creating railroad commissions with power to fix and establish rates has been upheld by the federal courts in numerous cases.

Stone et al. v. Farmers Loan & Trust Co., [illegible] U. S. 307.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.

Tilley v. Savannah F. & W. R. Co., 5 Fed. [illegible], 656, 658.

C. & N. W. Ry. Co. v. Dey, 35 Fed. 866, 874.

R. R. Comm. v. Central of Ga. Ry., 170 Fed. 225, 238.

Southern Pacific Co. v. Bartine, 170 Fed. [illegible]

Southern Pac. Co. v. Campbell (U. S. Circ. Ct. Dist. of Oregon, per Bean, J., July 3, 1911).

In *Chicago & N. W. Ry. Co. v. Dey*, *supra*, the proposition was advanced that the law of Iowa was unconstitutional because it seemed to delegate legislative

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power. Mr. Justice Brewer, after stating that the power of fixing rates is purely legislative, speaking for the Court said (page 874):

> "There is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the state, by constitutional enactment at least, from entrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the federal Constitution. So that, after all, the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force."

As a third reason he continues:

> "While, in a general sense, following the language of the Supreme Court, it must be conceded that the power to fix rates is legislative, yet the line of demarkation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the Legislature has been content to simply establish rules and principles, leaving execution and details to other officers."

And he concludes as follows:

> "While, of course, the argument from inconvenience cannot be pushed too far, yet it is certainly a matter of inquiry whether, in the increasing complexity of our civilization, our social and business relations, the power of the Legislature to give increased extent to administrative functions must not be recognized."

After an examination of the few authorities then extant bearing upon the subject, among which he cites *Stone v. Trust Co., supra*, he sums up that:

> "All the authorities that have been cited, or that I have been able to find, bearing upon this precise question, are in favor of the constitutionality of such a delegation of power."

SIMILAR DELEGATIONS OF LEGISLATIVE POWER, INVOLVING THE SAME PRINCIPLE, HAVE BEEN SUSTAINED BY THIS COURT REPEATEDLY, UPON THE PRINCIPLE THAT THE POWER CONSISTS MERELY OF THE ASCERTAINMENT OF FACTS UPON WHICH OPERATES THE GENERAL LEGISLATIVE RULE.

Miller v. Mayor of New York, 109 U. S. 385.

Field v. Clark, 143 U. S. 649, 680, 683, 691-2.

Buttfield v. Stranahan, 192 U. S. 470.

Union Bridge Co. v. United States, 204 U. S. 364, 371, *et seq.*

St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 287.

Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 339.

Monongahela Bridge Co. v. United States, 216 U. S. 177, 192.

United States v. Grimaud, 220 U. S. 506.

Hannibal Bridge Co. v. United States, 31 Sup. Ct. Rep. 603, 606 (not yet officially reported).

Under the constitution of the United States the powers of government are separated and defined in effect as they are separated and defined by the state Constitutions. The powers granted under the "Act to Regulate Commerce" as amended and the act creating the Railroad Commission of Oregon are very similar, and in many respects identical as indeed are substantially all the laws dealing with this subject. We know of no case in which this Court has directly passed upon the constitutionality of the "Act to Regulate Commerce" as delegating and intermingling legislative, executive and judicial power. Yet prior to the Hepburn Amendment of 1906, and what is of more consequence, since that amendment giving the Commission power to determine and establish reasonable maximum rates, this Court has repeatedly sustained orders of the Interstate Commerce Commission fixing rates and condemning discrimination.

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447, 474.

Interstate Commerce Commission v. *Cincinnati Etc. R. Co.*, 167 U. S. 479, 494, 508.

Texas & P. R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438, 448.

Interstate Com. Comm. v. *Illinois Central R. Co.*, 215 U. S. 452.

Baltimore & O. R. Co. v. *United States*, 215 U. S. 481.

Interstate Commerce Com. v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88.

Interstate Commerce Commission v. C. R. & Q. Ry. Co., 218 U. S. 113.

Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433.

Delaware, L. & W. R. Co. v. Interstate Com. Comm., 220 U. S. 235.

In view of the state of the law too much time may have been devoted to the question under discussion. However, it cannot have escaped the notice of the Court that in substantially every case involving orders of commissions naming rates, the law is attacked as being unconstitutional on the grounds of delegation or admixture of powers. It is therefore hoped that in the case at bar this question is so presented that it may be finally settled by this Court.

PENALTIES.

The bill alleges the penalties imposed by the Act are so severe and the remedies for the protection of a railroad in the event appellant seeks to invoke them are so inadequate, that it cannot invoke the jurisdiction of the Court except at the risk of confiscation of its property; and therefore appellant is denied due protection of the laws and its property subject to be taken from it without due process of law in violation of the Fourteenth Amendment.

It is doubtful if the sections of the Act relating to penalties are properly before the Court in this case or that the question can be presented in the manner attempted for the reasons, *first*, that no penalties are

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sought to be recovered, and *second*, the sections relating to penalties are wholly separable from the remainder of the Act.

United States ex rel. Atty. General v. Del. & Hudson Co., 213 U. S. 366, 417.

Assuming that the question will be considered, the following authorities and propositions are submitted.

From the bill it is difficult to determine whether the penalties prescribed are alleged to be so severe that the entire act is unconstitutional irrespective of the provisions provided by the act for review by the Courts of the action of the Commission, or taken in connection with the sections providing for review by the Courts it still is unconstitutional.

If the allegation of unconstitutionality is based upon the severity of the penalties imposed, it cannot be sustained. All laws of this character necessarily provide penalties more or less severe, of which the legislature in the first instance is the judge.

The penalties provided in the Oregon act for the same offense are generally not so severe as those contained in the Act to Regulate Commerce. Moreover, if the mere fact that a penalty for non-observance of the law, irrespective of any other reason, can be urged as a justification for its violation, it would substantially take from the legislature one of its most important powers and substitute the will of a court for that of the legislature.

Under the Iowa Railroad Commission Act, as amended, a fine of not less than $1,000 nor more than

$5,000 was imposed for a first violation of any of the provisions of the statute, and of not less than $5,000 nor more than $10,000 for a second such offense. This provision of the law was attacked in *Burlington, C. R. & N. R. Co. v. Dey,* 82 *Iowa* 312, 341, upon the ground that the penalties imposed were excessive and forbidden by Section 17, Article 1 of the State Constitution.

In discussing this question the Iowa Supreme Court in 82 Iowa, at page 341 says:

> "It is urged that the fines imposed by the statutes for its violation are excessive, and forbidden by section 17, article 1, of the state constitution. The fines are intended to enforce obedience to the law by corporations having great incomes and controlling vast properties. The legislature, in exercise of its wisdom, fixed penalties which, if imposed upon individuals, might appear excessive, but when imposed upon the corporations would be esteemed no greater than is necessary to enforce obedience to the statute. The railroad companies have a ready and efficient way of avoiding these severe penalties, namely, by obeying truly the laws of the state. If they do this, they are in no danger of the penalties; if they do not, they are in no condition to complain of the laws."

SECTIONS 48-51-52 AND 53 OF THE ACT.

The bill of complaint particularly attacks the penalties provided in Sections 48, 51, 52 and 53 of the Act. It would be well, therefore, to call attention to the acts condemned and for which penalties are provided.

Section 48 (Rec. 140) provides penalties for unjust discrimination and for rebates. The penalty provided

for the offense defined in this section is not less than $100 nor more than $10,000 for each offense, payable to the state by the railroad; any agent or officer offending shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $100 nor more than $1000 for each such offense.

Under Section 51 (Rec. 141), any person damaged by any act, matter or thing in the act prohibited or declared unlawful, or by omission of any act required to be done, can recover treble the amount of damage sustained with a reasonable attorney's fee to be fixed by the court.

This particular section has been reviewed by the Supreme Court of the state of Oregon in the case of *Martin v. Oregon R. & N. Co.*, 118 Pac. 17 (not yet officially reported) and sustained.

Section 52 (Rec. 141), provides a penalty of not less than $100 nor more than $1,000 for any officer, agent or employee who fails or willfully refuses to fill out blanks, required by the act, or fails or refuses to answer questions therein propounded, or knowingly or willfully gives a false answer to any such question, or evades answering where the fact inquired of is within his knowledge; or who shall upon proper demand fail or willfully refuse to exhibit to the Commission or any person authorized to examine the same, any book, paper or account in his possession or under his control; and a penalty of not less than $500 nor more than $1,000 against the railroad for each such offense when such officer, agent or employee acted in obedience to the direction, instruction or request of such railroad or general officer thereof.

Section 32 (Rec. 142), provides a penalty of not less than $100 nor more than $10,000 for failing, neglecting or refusing to obey any lawful requirement or order made by the Commission, or any judgment or decree made by any court upon its application, by violating any provision of the act or doing any act prohibited for which a penalty has not been provided. It is also provided that the act, omission or failure of any officer, agent or other person, acting for or employed by any railroad, acting within the scope of his employment, shall in every case be deemed to be the act, omission or failure of such railroad.

PENALTIES PROVIDED IN ACT TO REGULATE COMMERCE.

While not controlling, to the extent that the Act to Regulate Commerce, and the penalties thereby imposed are indicative of the judgment of Congress as to the penalties which should be imposed for violation of similar acts and failure to observe similar regulations it is of interest to note that the penalties provided by Congress are far more drastic than those provided by the Act creating the Railroad Commission of Oregon. As illustrative, under the Act to Regulate Commerce the doing of anything prohibited or declared unlawful or of willful omission of a thing required is made a misdemeanor with a fine not to exceed $5,000 for each offense and if an unlawful discrimination, two years imprisonment may be inflicted in addition, Sec. 10, Act to Regulate Commerce. For false billing, classification or weighing, a fine of $5,000 and two years imprisonment is provided. (Sec. 10, Act to Regulate Commerce).

For giving or offering rebates or soliciting or accepting rebate, a fine of $1,000 to $20,000 for each offense with a possible imprisonment of two years is provided. (Section 1, Elkins act). Failure to obey an order is punished by a fine of $5,000 for each offense and each distinct violation is a separate offense. Section 16, Act to Regulate Commerce. Failure to attend and testify or produce books and papers is punished by a fine of $100 to $5,000 with an imprisonment of not more than one year or both. (Immunity of Witness Act).

Section 8 of the Act to Regulate Commerce contains a provision for recovery of damages sustained in consequence of any violation of its provisions together with reasonable counsel or attorney's fees to be fixed by the Court in every case of recovery.

PENALTY PROVISIONS MUST BE CONSIDERED WITH OTHER PROVISIONS.

The various sections of the Act in respect to penalties must be considered with other sections of the same Act connected with the same subject matter.

Sections 22 to 25 (Rev. 154, 155) provide a method of procedure by which any corporation dissatisfied with any order of the Commission may commence a suit to vacate the same, and Section 23 provides for the issuing of an injunction suspending the operation of any such order upon giving bond provided by the Act. If the Court issues an injunction suspending the order of the Commission, it would be impossible for penalties to run against carriers during the pendency of the restraining order. It seems to be plain that the penalties referred to in Section 22 are those accruing to individuals

and not penalties accruing to the state under the suspended order.

This is made unmistakable by the amendment to Section 32 adopted in 1909, set out as an appendix to this brief.

Where one of two constructions can be adopted, the one which will carry out the evident intent of the legislature will be the one sustained by the Court.

A continued violation of almost any law would result in enormous penalties. This is as true of the individual as of the corporation, and it is as logical to urge that, because a large number of violations of the Act might occur followed by prosecutions and for that reason it is void, that the penal code would also be void because a great number of acts are prohibited and penalties provided which might be inflicted upon individual members of the community.

THE RAILROAD COMMISSION ACT PROVIDES ADEQUATE PROTECTION AND REMEDY.

An examination of the Act will show beyond question that the legislature has been careful to provide full protection against any unlawful or unjust action of the Commission.

Under Section 29, any person who shall neglect or refuse to attend and testify, or to produce books, papers, etc., if in his power to do so in obedience to the subpoena or lawful requirements of the Commission, shall be guilty of a misdemeanor and upon conviction by a court of competent jurisdiction, shall be punished by a fine of not less than $100 nor more than $1,000 or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment (Rec. 16).

With this exception no violation of the Oregon act or disobedience of an order of the commission is punishable by a jail sentence. Under the law, upon conviction of misdemeanor, imprisonment does not necessarily follow if the fine is not paid, for this is discretionary with the court.

OPINION OF CIRCUIT COURT.

The review by the court below of these provisions of the act and their legal effect is so clear and convincing, we quote from the opinion of the court, 173 Fed. 988-989 (Rec. 72 to 75 inclusive):

> "Let us now proceed to the question whether the penalties imposed by the act are of such a nature as practically to deprive the complainant of the equal protection of the law. A way for ascertaining whether the rates fixed by the railroad commission are reasonable, by judicial determination, is afforded the carrier by the provisions of the act. The complainant complains, however, that to avail itself of such provisions it must either obey the order of the railroad commission pending legislation, or resort to the court for an injunction suspending or staying the order in the meanwhile; but that, if resort be had to the injunction, the act requires the giving of a bond incurring such heavy liabilities in case of failure to sustain the contention that no company could well afford the experiment. The conditions of the bond required are that the company shall answer for all damages caused by the delay in the enforcement of the order of the commission, for all penalties that would attach against the company, and for all compensation for what-

soever sums for transportation services any person or corporation shall be compelled to pay in excess of the sum such persons or corporation would have been compelled to pay if the order of the commission had not been suspended.

"Here are three conditions. The last of the three we must dismiss at once, as being perfectly reasonable and just, for if the order of the commission was reasonable, and so adjudged to be by the court, it should be obeyed from the first. As to the first condition, touching what damages would ensue by reason of delay in enforcing the order, none have been suggested that would be at all burdensome, nor do I now think of any of that character.

"The second condition, at first blush, would seem onerous, and a drastic thing to require of a litigant. But what are the penalties that would attach against the railroad so circumstanced? By the fifty-first section of the act, if any railroad company shall omit to do any act, matter or thing required to be done by it, such railroad is rendered liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, together with reasonable attorney's fees. These damages may partake of the nature of a penalty. But what damages would ensue to any person, corporation or the state for a refusal to obey an order fixing rates? It might be said that a shipper was damaged by the difference between the rates established by the commission and those charged by the company, but that item is expressly provided for by the third condition, which, by implication, excludes it from the

operation of the second. There may be in some way damage to somebody attending the failure of the railroad company to obey the order of the commission and to adopt certain rates; but, whatever it may be, it cannot be large or oppressive, even if trebled.

"Now, what other penalties are provided? By Section 52 it is declared that if any officer, agent or employe shall fail or refuse to do any of the following things he shall be deemed guilty of an offense and be subject to a fine of from $100 to $1000, and a penalty of from $500 to $1000 is recoverable from the railroad company for each such offense when the officer, agent or employe acts in obedience to its direction. These are the things enumerated: Shall refuse to fill out and return any blanks required by the act, or refuse to answer any questions therein propounded, or shall give false answers to any such questions, or shall, upon proper demand, refuse to exhibit any book, paper, account, etc., in his possession or under his control. It is plain that none of these things are covered by the second condition of the bond. The fifty-third section provides that if the railroad shall violate any provision of the act, or shall fail or refuse to obey any lawful requirement of the commission or judgment or decree of the court, for every such offense such railroad shall forfeit to the state from $100 to $10,000.

"It is probable that the penalties here provided for would not be covered by the bond, because the injunction is provided by law. The company would be availing itself of a lawful right, and while so doing it would seem that it could not at the same time be held for a vio-

lation of Section 58 by a refusal to obey an order of the commission or a judgment or decree of the court. But however this may be, the penalty condition of the bond has been eliminated by an amendment of Section 58, adopted February 28, 1909. See Sess. Laws 1909, p. 168. So that the bond exacted can be no impediment of substantial moment standing in the way of the complainant obtaining a speedy and complete adjudication touching the reasonableness of the rates fixed by the commission.

"But the railroad company is entitled to sue for relief against any unlawful order of the railroad commission in any court, state or federal, having jurisdiction, and it is said the penalties imposed by Section 58 are so enormous as to deter the company from seeking relief in any court but that named in the act, and in the way prescribed. From a reading of the section it will be seen that it is the railroad only that is amenable to the penalty prescribed, not its officers, agents or employes. These functionaries of the railroad are made fixing responsibility upon the railroads, so that in a case like the present the railroad would be chargeable with a violation of the act in failing to obey the order of the railroad commission requiring the revision of local rates within the state—one offense, not a repetition of offenses from day to day, or at intervals, as long as the railroad continued in the refusal to obey the order. It would seem that such is the reasonable construction of the section. Being penal, it should receive a strict construction, and no accumulation of offenses should be

carved out of it, unless they are created by the strict letter of the law.

"Section 52, as I have shown, penalizes special acts only, which are enumerated in the section, none of which are involved by this controversy. Section 51 relates to the recovery of damages in treble the amount of loss suffered, but the railroad company is not penalized, except by the provisions of Sections 52 and 53, and this latter section does not affect its agents and employes.

"Now it is urged that the case of *Ex parte Young*, 209 U. S. 123, is decisive of the particular point here presented. The statutes under consideration in that case, however, were most severe and drastic. For a violation of the act, if by a natural person, a fine of from $2500 to $5000 was imposed for the first offense, and double that for each subsequent offense, and a like fine was imposed if the carrier was a corporation. Another section of the act fixed passenger rates at two cents per mile, and provided that any railroad company, or any officer or representative thereof, violating any of the provisions of the act should be guilty of a felony, and subject to a fine not exceeding $5000, or imprisonment in the state prison not exceeding five years, or both. Another section provided for the regulation of freight traffic, and made any violation of such regulation a misdemeanor, punishable by imprisonment in the county jail. It will be seen at once that there is no comparison between the penalties imposed by the Oregon statute and that of Minnesota, and the difference is so wide as to render the Young case not authoritative here.

"Nor do I think that the penalties imposed are exorbitant or burdensome for willful violations of the provisions of the act. They were designed to secure an enforcement of the law, and I discover no intendment to prevent the railroad companies concerned having ample recourse to any court having jurisdiction for relief."

Considering the purpose for which the penalties are inflicted, the fact that by the express provisions of the statute the penalties must be recovered by a separate action, that the railroad has its defense and its day in court, that appeals to the courts are provided from the orders of the commission, and the statute gives them precedence over all other civil matters, it is difficult to see how the law deprives appellant of due process of law or any defense it may have to protect its property rights.

LEGISLATIVE DUTY TO FIX FINES.

To the legislature belongs the duty of fixing fines and providing for their enforcement.

Southern Express Co. v. Commonwealth, 99 Va. 59.

This case was affirmed, without opinion, in 168 U. S. 705, on the authority of *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339.

RULE WHERE PART OF ACT IS CLAIMED TO BE UNCONSTITUTIONAL.

Where part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in sub-

ject matter, depending on each other, operating together for the same purpose, or otherwise so closely connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other—and this though the constitutional and unconstitutional provisions be contained even in the same section, if distinct and separable.

Cooley, Const. Limitations, 7th Ed., p. 246.

Reagan v. Farmers L. & T. Co., 154 U. S. 362, 395-6.

Willcox v. Consolidated Gas Co., 212 U. S. 19, 53, 54.

Fleischner v. Chadwick, 5 Ore. 152, 154.

State v. Wiley, 4 Ore. 184, 187.

C. B. & Q. R. Co. v. Jones, 149 Ill. 361, 387.

State v. Railroad Commission, 52 Wash. 17, 33.

St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317, 359.

R. R. Comm. v. Central of Ga. Ry. Co., 170 Fed. 225, 239.

The Texas act created a railroad commission with power to make rates reviewable in the courts. The act also contained provisions alleged to be unconstitutional—making the rates conclusive *inter partes,* and imposing excessive penalties. Held (per Brewer, J.),

> "The invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with powers to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislation. This

is fully accomplished whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simple *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute."

Reagan v. Farmers Loan & Trust Co., supra, 395.

EX PARTE YOUNG.

It is evident the bill of complaint in this suit was framed to bring it within the decision of *Ex parte Young*, 209 U. S. 123. The court below in its opinion pointed out the radical difference between certain of the facts in the *Young* case and the case at bar. There are other features in the *Young* case than those referred to in the opinion that also distinguish it.

In the opinion in the *Young* case, the Supreme Court laid great stress upon the fact that the rates were established without any prior hearing having been had, and in this connection say (page 148):

> "Now to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given), only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low and therefore invalid. The distinction is obvious between a case where the

validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event." The court says: "We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The acts attacked were legislative maximum rate acts with drastic penalties, one fixing passenger rates, one commodity rates. An order of the Railroad and Warehouse Commission was also attacked. The acts in question were mandatory and conclusive and did not purport to be a general plan of regulation. No hearing was had, no opportunity to inquire into the reasonableness of the rates given, no appeal provided. We quote from the opinion (page 145):

"For disobedience to the freight act the officers * * * of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days." * * * "Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding $5000 or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment."

The sale of each ticket above the price permitted by the act would be a violation thereof. The court also (page 146) calls attention to the fact of the officers, agents or employes of the company having to take "*the risk of imprisonment for years as a common felon.*"

It is now being sought to apply the doctrine of the *Young* case to every act, state or federal, creating a regulative commission, and by construction make it cover cases and acts to which it has no application.

What has been said respecting the various provisions and penalties imposed by the Oregon act, and the method provided for their enforcement need not be repeated.

NO JURISDICTIONAL DEFECT ALLEGED.

Attention of the court is directed to the fact that by the bill of complaint and particularly Exhibit I thereof (Rec. 182), it appears every provision of the law was followed by the railroad commission, and if the law is constitutional there is no jurisdictional defect in any of the proceedings.

A complaint was filed before the commission, issues joined, both parties appeared and participated in the hearing, testimony was taken, and the issues were carefully investigated. The order was duly made and served. If dissatisfied therewith appellant, under the provisions of the act, could have brought suit in the Circuit Court of Oregon for Marion County and could have had the entire question speedily disposed of under the provisions of the law for expediting this class of cases. An appeal to the Supreme Court of the state could also be taken, the hearing of which would also be expedited.

ATTORNEY'S FEES.

Provision of statute allowing attorney's fees in certain cases sustained:

Riverside Mills v. Atl. Coast Line R. Co., 168 Fed. Rep. 990.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73.

Martin v. Oregon R. & Nav. Co. (Sup. Ct. Oregon), 118 Pac. 17.

VENUE OF SUITS IN STATE COURTS.

The provision of the act, Sec. 32 (Rec. 347), which confers jurisdiction on the Circuit Court of the state of Oregon for Marion County is not subject to criticism. It in no way deprives appellant of any constitutional rights. Marion County is the county of the state wherein the capitol of the state is situated and all state offices located. The office of the railroad commission is by law required to be maintained in the capitol. It is a very common provision in statutes of this character, and it would seem the state should have the right to fix the venue of suits and actions against its own officers.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.

ADEQUATE REMEDY PROVIDED BY ACT.

Considering the provisions of this act, it is a matter of grave doubt under the authority of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, whether appellant should

not have exhausted the remedy provided by the act itself for the determination of the reasonableness of the rates fixed by the order before resorting to the federal courts for relief.

DUE PROCESS OF LAW.

As we have just pointed out, it would seem appellant had but to follow the provisions of the act to have secured relief, and the remedy is plain, adequate and speedy.

It is not to be assumed that state courts are any less careful of the rights of litigants than are federal courts, nor is this assumption the basis of the jurisdiction of federal courts in cases of this character.

It is apparent that appellant's reliance for support of the theory of the lack of due process of law is the case of *Chicago M. & St. P. R. R. Co. v. Minnesota*, 134 U. S. 418, and particularly the following expression in the opinion:

> "It" (referring to the order) "deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Necessarily this statement was based on the facts before the court, and applied and was intended to apply

to these facts and the law as it had been construed by the Supreme Court of Minnesota.

Taking this extract from this decision and the declaration of the Oregon act, Section 12, that "the charges made for any service rendered or to be rendered * * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful," appellant contends that it has the right to a judicial determination of the reasonableness of the rate in the ordinary meaning of the word reasonable considered purely as a traffic matter.

In other words, after the commission has heard and passed on the question as to the reasonableness of a particular rate as a traffic proposition, the same question is to be heard and determined again by a court.

THE MINNESOTA CASE IS NOT AUTHORITY FOR THIS CONTENTION.

In passing upon the Minnesota case this court held it was bound by the construction put upon the state act by the Supreme Court of Minnesota, then set out in the opinion:

> "The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but *final and conclusive* as to what are equal and reasonable charges; that *the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact*; that, under the

statute, the rates published by the commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable." (Italics ours).

In the majority opinion the court said:

"No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

The court, it will be observed, did not undertake to say whether the particular rates in question were or were not reasonable. It simply held under the statute in question due process of law was denied.

There was some general discussion of the subject which may be misleading if superficially read, but when taken in connection with the concurring opinion of Mr. Justice Miller and viewed in the light of later cases decided by the Supreme Court, the meaning of the court cannot be doubted. The proposition as stated by Mr. Justice Miller is that neither the legislature nor the commission acting under this authority can establish arbitrarily, and without regard to justice and right, a tariff of rates which is so unreasonable as to practically destroy the value of property.

In the case of *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 749, the court, reviewing the Minnesota case, said:

"What this court said about the Minnesota statute can have no application to the present

case unless it be made to appear that the constitution and laws of California invest the municipal authorities of that state with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject."

The court then quotes with approval the following language from the case of *Spring Valley Water Works* v. *San Francisco*, 82 Cal. 286, 306-7, 309, 315:

> "But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation have come to a different conclusion as to the reasonableness of the rates fixed."

Let us see where this contention of counsel would lead us. If the reasonableness of a rate, as a mere traffic proposition, is a judicial question, then the court may, in any case, review the finding of the commission on this question. If the court may determine the reasonableness of a rate in the sense indicated it may declare, and indeed would be driven to say, what is a reasonable rate to be charged in the future, and, therefore, usurp purely legislative and administrative power.

The Minnesota case is authority against appellant, and not in its favor.

PROCEDURE UNDER OREGON ACT.

Under the Oregon act every possible opportunity is given the railroad for a full hearing.

After complaint is filed and before proceeding with the investigation, the railroad complained against must be given ten days notice of the complaint, and then at least ten days notice of the time and place of hearing; all parties are entitled to be heard and have process to enforce the attendance of witnesses.

Other provisions for the purpose of securing a full and complete hearing to all concerned are provided. No lawful order can be made without observing all the jurisdictional requirements (Sec. 28-29) (Rec. 129-132).

The order is not conclusive, but is made *prima facie* lawful, subject to review as provided in Section 32 and Section 38 as amended.

It is not alleged by appellant that it was in any particular denied any of its rights under the law, that the commission did not follow the law, that appellant did not have every opportunity to present any and every fact it desired. On the contrary it affirmatively appears from the bill of complaint that a complaint was filed before the commission and answer made by appellant and issue joined. The cause came on first for hearing November 4, 1907. At this hearing and at all subsequent hearings appellant was represented by counsel and a large amount of testimony taken. The case was investigated carefully and the order not made until April 22, 1908.

Under this state of facts, how can appellant urge it has been denied due process of law or that on the facts as alleged in the bill of complaint and exhibits made a part thereof the *Minnesota* case is authority for such contention? A forceful discussion of this same point

based on the *Minnesota* case will be found in *State ex rel. Oregon R. & Navigation Company v. Railroad Commission of Washington*, 52 Wash. 17, at pages 27, 30-31. The appellant in that case is the appellant in this.

DUE PROCESS OF LAW DOES NOT ALWAYS REQUIRE THE ACTION OF A COURT.

Due process of law merely requires such tribunals as are proper to the subject in hand. Reasonable notice and a fair opportunity to be heard before some tribunal before the issues are decided on are the essentials of due process of law.

In *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, at page 571, Mr. Chief Justice Fuller, speaking for the court says (italics ours):

> "The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; *that the state has power to exercise this control through boards of commissioners;* that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in

the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, *by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious;* and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States." Citing

Nashville, C. & St. L. Co. v. Alabama, 128 U. S. 96.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26.

Dent v. West Virginia, 129 U. S. 114.

Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386.

Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364.

The following cases also discuss and define what constitutes due process of law:

Kennard v. Louisiana ex rel. Morgan, 92 U. S. 480, 482.

Davidson v. New Orleans, 96 U. S. 97, 102.

Brown v. New Jersey, 175 U. S. 172, 176.

Public Clearing House v. Coyne, 194 U. S. 497, 508.

The right of appeal is not an essential element in due process of law.

Raetz v. Michigan, 188 U. S. 505, 508.

PRESCRIBING RATES FOR THE FUTURE A LEGISLATIVE FUNCTION.

The reasonableness of rates prescribed by governmental authority to be charged in the future is not a judicial question. It is a legislative question. In no case has a court passed on the mere reasonableness of a rate as a traffic proposition. Courts interfere only where commissions act beyond the scope of their authority or have abused their discretion. Neither legislature or commission can confiscate property under the guise of regulation, and in such cases courts can set aside a law or an order.

In the case of *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362 at page 397, it was said:

> "Courts * * * do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work, but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

The rule declared by the Supreme Court in an unanimous decision, in the case of *San Diego Land &*

Town Co. v. National City, 174 U. S. 739, at page 754, is as follows:

> "The judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

This expression of the Supreme Court has been repeatedly affirmed, notably in the recent cases of *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, and *Willcox v. Gas Co.*, 212 U. S. 19.

The allegations in the bill of complaint signally fail to meet this requirement.

That rate making is a legislative function is true whether it be exercised directly by the legislature itself or by some subordinate or administrative body to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power.

Noyes, Am. R. R. Rates, pp. 203, 207.

Munn v. Illinois (Granger Cases), 94 U. S. 113, 133.

Prentis v. Southern R. Co., 211 U. S. 210.

Honolulu R. T. & L. Co. v. Hawaii, 211 U. S. 282.

Knoxville v. Knoxville Water Co., 212 U. S. 1.

Mr. Justice Brewer, in delivering the opinion of the court in the case of *Interstate Commerce Commission v. Cincinnati etc. Railroad Co.*, 167 U. S. 479, 499, says:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

In *McChord v. Louisville & Nashville R. Co.*, 183 U. S. 483, 495, Chief Justice Fuller, speaking for the court, says:

> "The fixing of rates is essentially legislative in its character."

Mr. Justice Moody in *Home T. & T. Co. v. Los Angeles*, 211 U. S. 265, 278, says:

> "Rate regulation is purely a legislative function."

In *Honolulu R. T. Co. v. Hawaii*, 211 U. S. 282, 290-291, it is held that the power to regulate the operation of railroads includes regulation of the time of the running of cars, that such power is legislative in character, and the legislature itself may exercise it or may delegate its execution in detail to an administrative body.

In *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226, the court held:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter."

THE ACTION OF THE COMMISSION HAS THE EFFECT OF LAW.

It appearing that the making of a rate for the future is legislative in its character, and that the legislature may confer upon a commission, an administrative body, power to fix rates for the future, it becomes pertinent to inquire as to the effect of an order of the commission fixing a rate.

Whether the legislature acts directly, naming the specific rates, or whether it adopts general rules and delegates power to apply them to specific facts and exercise discretion in respect thereto, the result is the same; the ultimate act is legislative. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power.

Knoxville v. Knoxville Water Co., 212 U. S. 1.

Prentis v. Southern R. Co., 211 U. S. 210.

Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282.

Atlantic Coast Line Ry. Co. v. North Carolina, 206 U. S. 1.

Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

Texas & Pac. Ry. Co. v. Mugg, 202 U. S. 242.

Texas & Pac. Ry. Co. v. Cisco Oil Co., 204 U. S. 449.

Judge Walter C. Noyes, in his excellent work on American railroad rates, states the proposition, page 250, as follows:

> "It seems impossible to draw a constitutional statute conferring upon a court power to review upon the facts the action of the Interstate Commerce Commission in making a rate. The courts could not make a rate, for rate making is not, and cannot be, a judicial function. They cannot supervise the action of the commission for precisely the same reason. There is no difference in principle between making a rate and reviewing upon its merits the action of a commission in making a rate. In both cases the exercise of legislative, not judicial, discretion is required. A statute requiring the courts to participate directly or indirectly in making rates for the future would impose non-judicial functions and would be unconstitutional. To repeat what we have already pointed out, it cannot be too clearly borne in mind that while the courts can determine the reasonableness of the carriers' charges they cannot, in the same way and from the same point of view, determine the reasonableness of commission-made rates. When a rate is made by a commission, under a law, it has the effect of a law which the courts can only review upon constitutional grounds. The distinction is between the reasonableness of a charge and the reasonableness of the law.
>
> "But it may be said that the courts always have examined rates made by commissions to

determine whether they are reasonable, and decisions of the Supreme Court of the United States may be pointed out where the enforcement of commission-made tariffs has been enjoined because the rates were unreasonable. But, as we have already seen, the word 'unreasonable' in the sense of these decisions means confiscatory. The only ground upon which the court could interfere with rates made by the Interstate Commerce Commission would be that they violated an amendment of the constitution—that they deprived the railroad of its property without just compensation or due process of law—and they could only have that effect when they were confiscatory."

POWER OF THE LEGISLATURE.

Legislative bodies have absolute and uncontrolled powers of legislation, except, *first*, as it may have been limited by the constitution of the United States; and, *second*, as it may have been limited by the constitution of the state. A legislative act cannot, therefore, be declared void unless its conflict with one of these two instruments can be pointed out. *Cooley, Constitutional Lim.* (7th Ed. 241).

> "Whether a statute is constitutional or not is always a question of power. * * * The court must assume that legislative discretion has been properly exercised: If evidence was required, it must be supposed it was before the legislature when the act was passed."

The courts have no right to inquire into the motive of a legislature. *Cooley, Constitutional Lim.* (7th Ed. 257).

"The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power." *Cooley, Constitutional Lim.* (7th Ed. 236).

The courts "have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body." *St. Louis & I. M. R. Co. v. Taylor*, 210 U. S. 281, 295.

There is no such thing as a court exercising any power or control over the legislature. If an act is unconstitutional it will so declare; beyond this it cannot go. The legislature, except as limited by the constitution, exercises the sovereign powers, and its will is the sovereign will.

The Supreme Court of the United States in the case of *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 452, 470, says:

"Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

PRESUMPTION ORDER IS LAWFUL.

Certain presumptions attend the constitutionality of statutes. A rate made under legislative authority is the law, and the same presumptions attach to it.

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt the expressed will of the legislature should be sustained."

Waite, Chief Justice, in *Munn v. Illinois*, 94 U. S. 113, 123.

Mr. Justice Field in the case of *Ruggles v. Illinois*, 108 U. S. 526, 541, says that the legislative rate is to be taken as presumptively reasonable.

Harlan, J., said in *Sweet v. Rechel*, 159 U. S. 380, 392:

> "In determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the constitution. It is a well settled rule of constitutional exposition that if a statute may or may not be according to circumstances, within the limits of legislative authority the existence of the circumstances necessary to support it must be presumed."

Mr. Justice Brewer said in *Chicago etc. R. Co. v. Wellman*, 143 U. S. 339, 344:

> "The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its

> solemn duties, determine whether the act be constitutional or not, but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals."

In the same case he speaks of "how easily courts may be misled into doing grievous wrong to the public, and how careful they should be not to declare legislative acts unconstitutional."

The same admonition was expressed in *San Diego etc. Co. v. National City*, 174 U. S. 739, 754, Mr. Justice Harlan saying:

> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Mr. Justice Brewer repeats this doctrine in *Chicago etc. R. Co. v. Tompkins*, 176 U. S. 167, 173, in this language:

"In approaching the consideration of a case of this kind we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld.

"Such being unquestionably the law, it is obviously of the utmost importance that the facts shall be clearly and accurately found and distinctly stated by the trial court, and that those facts shall sustain the conclusion reached."

The Supreme Court of the United States has found it necessary, apparently, to repeat these doctrines over and over again. Justice Shiras, in the case of *Louisville etc. R. Co. v. Kentucky*, 183 U. S. 503, 511, finds occasion to express it in this language:

"For the federal courts to interfere with the legislative department of the state government when acting within the scope of its admitted powers is always the exercise of a delicate power—one that should not be resorted to unless the reason for doing so is clear and unmistakable."

In the very recent case of *Knoxville v. Knoxville Water Company*, 212 U. S. 1, 8, Mr. Justice Moody, referring to a city ordinance fixing water rates in Knoxville, says:

"There can be at this day no doubt, on the one hand, that the courts, on constitutional grounds, may exercise the power of refusing to enforce legislation, nor, on the other hand,

> that the power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proven to the satisfaction of the court."

In the case of *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, the court emphasizes the idea, apparent to all who are familiar with the character of the evidence usually introduced in rate cases, that until rates are fairly tried it is well-nigh impossible to determine the effect of reduced rates upon the revenues of the company. Such evidence consists mostly of statistics relating to past experiences under the old rates, and of opinions and speculations as to the probable effect of the proposed new rates. Justice Peckham, in that case, says (page 41):

> "The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates."

COMMISSIONS ARE NECESSARY.

Such commissions are necessary. It is practically the only method by which a legislature or Congress may effectively exercise the rate-making power.

Noyes, Amer. R. R. Rates, p. 206.

Redfield, Railways, 6th Ed., Vol. 2, p. 606.

R. R. Comm. v. Ga. Ry. Co., 170 Fed. 225.

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THERE IS NO LEGAL STANDARD BY WHICH THE REASONABLENESS OF A RATE CAN BE TESTED, AND HENCE NO RATE CAN BE SAID, AS A MATTER OF LAW, TO BE REASONABLE IN AND OF ITSELF.

The question is one of fact depending on many considerations.

Ill. Cent. R. Co. v. Int. Com. Comm., 206 U. S. 441.

Tex. & Pac. R. Co. v. Int. Com. Comm., 162 U. S. 197.

C. N. O. & T. P. R. Co. v. Int. Com. Comm., 162 U. S. 184.

THE COMMISSION IS AN EXPERT BODY.

The commission is an expert body. It has provided for it by law means and sources of information for the purpose of being informed on the subjects of complaints brought before it. The performance of the duties imposed upon the commission by law make them experts. This fact is recognized by the courts.

Such a tribunal, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is in a sense an expert tribunal.

Smyth v. Ames, 169 U. S. 466, 527.

East Tenn. V. & R. Co. v. I. C. C., 99 Fed. 62, 64.

Steenerson v. Great Northern R. Co., 69 Minn. 353, 377.

Minn. St. P. & S. Ste. M. R. Co. v. R. R. Comm., 136 Wis. 146.

Besides this the work of the commission requires much expert knowledge of the difficult subject of transportation and rates, the construction of economic as well as legal principles and an intimacy with local and state traffic conditions. Consequently unless required to do so by the mandate of the law, the courts should interfere as little as they may with the determination and work of the commission. *Minn. St. P. & S. Ste. Marie Ry. Co. v. R. R. Comm. of Wis.*, 136 Wis. 146.

COMPARISON OF POWERS GRANTED UNDER THE OREGON ACT AND ACT TO REGULATE COMMERCE RESPECTING AUTHORITY TO FIX JUST AND REASONABLE RATES.

Section 12 of the Oregon act (page 26 *ante*) provides *inter alia* "the charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 1 of the act to regulate commerce as amended provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Under Section 28 of the Oregon act (page 29 *ante*) the commission is empowered on complaint or on its motion to investigate rates, fares, charges and classifications.

> "If upon such investigation the rate or rates, fares, charges or classifications or any joint rate or rates or any regulation, practice or service complained of shall be found to be unreasonable or unjustly discriminatory, or the service shall be found to be inadequate, the commission shall have power to fix and order substituted therefor such rate or rates, fares, charges or classifications as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future," etc.

Section 13 of the Act to Regulate Commerce as amended provides for complaints, hearings and investigations. Section 14 provides for report and findings thereon. Section 16 provides that after full hearing under Section 13 of the act if

> "The commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged or collected by any common carirer or carriers subject to the provisions of this act for the transportation of persons or property * * * are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial * * * the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged," etc.

Further comparison will show that in substance the Act of the Oregon legislature, and the Congressional Act to Regulate Commerce are alike.

Both Congress and the legislature have thus fixed the standard beyond which a rate shall not go and be lawful. The power of the Commission in both instances is limited by providing the measure or standard it shall use. Within this limit an order of the Commission is in effect a law.

CONSTRUCTION BY THE SUPREME COURT OF THE ACT TO REGULATE COMMERCE AND THE POWERS OF THE COMMISSION.

Fortunately in this connection we do not have to indulge in speculation or analysis. The Supreme Court has settled this question finally. Under the statute the only inquiry open to the Courts is as to whether the order was regularly made and duly served and whether any constitutional rights have been violated. In other words are the rates fixed confiscatory? Has the Commission under the guise of regulation acted so arbitrarily as to abuse its discretion or otherwise acted beyond the scope of its authority? "Power to make the order and not the mere expediency of having made it, is the question." Indeed in passing upon the reasonableness and justice of a rate it may be said the conclusions of fact by the Commission are conclusive.

Illinois Central R. R. Co. v. I. C. C., 215 U. S. 452.

Baltimore & O. R. R. v. United States, 215 U. S. 481.

Southern Pacific Co. v. I. C. C., 219 U. S. 433.

In *Interstate Com. Comm. v. Chicago, etc., R. Co.*, 218 U. S. 88, 110, the court said:

> "One question remains for discussion,—the finding of the Commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, due to the judgments of a tribunal appointed by law and informed by experience." (Citing *Illinois C. R. Co. v. Interstate Com. Comm.*, 206 U. S. 454 and cases cited.)

In the same case the Court also said (page 110):

> "We have also said that the primary jurisdiction is with the Commission, the power of the courts being that of review, and is confined in that review to questions of constitutional power and all pertinent questions as to whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made." (Citing *Interstate Com. Comm. v. Illinois C. R. Co., supra.*)

In *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, the Court said:

> "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

This principle was reiterated in *Willcox v. Consolidated Gas Co., supra.*

In *President, Managers, etc., of Monogahela Bridge Co. v. United States,* 216 U. S. 177, the bridge company had been convicted for failing to make alterations in a bridge over an interstate waterway, which the Secretary of War required. The Secretary was authorized, by general act of Congress, to prescribe reasonable regulations for the conduct of navigation on the navigable streams of the United States, after due notice and hearing. The parallel between that delegation of power and the delegation of power to make reasonable rules for the conduct of transportation upon rails is obvious.

The court held the delegation of power to be valid and not open to the charge of violation of the constitution; that legislative and judicial powers were not intermingled with executive functions; that the power of the Secretary was not an arbitrary one, as he had to give due notice and opportunity to be heard and a reasonable time to comply with the orders made; that the requirements made did not amount to a taking of property for public use without due compensation; and that there had been a hearing before the Secretary. The court said (page 195):

> "It does not appear that the Secretary disregarded the facts or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secre-

tary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers conform their action to the mode prescribed by Congress."

The Supreme Court has on occasions reversed the Interstate Commerce Commission's decisions—more particularly before the amendments of June 29, 1906, than since—but it has repeatedly explained that the actions of the Commission can be impeached only for errors of law, and that the court has never interfered with a determination of the Commission upon questions of fact, or mixed fact and law. The determination of a reasonable rate is peculiarly a question of fact.

Illinois Central R. Co. v. Interstate Commerce Comm., 206 U. S. 441, 454.

Cincinnati, H. & D. R. Co. v. I. C. C., 206 U. S. 142, 154.

Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648.

In view of this unbroken line of authorities, many of them passing upon an Act of Congress substantially the same as the Oregon act, it may well be asked what principle requires a different construction in the one case than the other. The only distinction is that one commission passes upon interstate rates under a congressional grant of power, and the other commission passes upon intrastate rates under powers granted by the state legislature. Should one rule be adopted in the one case and not in the other it would lead to confusion worse confounded.

THE STATE COURTS UNDER SIMILAR STATUTES CONSTRUE THE POWERS OF THE COMMISSION AND OF THE COURTS SUBSTANTIALLY AS HAS THE SUPREME COURT OF THE UNITED STATES.

In *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 375, 376, the court in discussing this question said:

> "If by this the legislature intended to provide that the court should put itself in the place of the commission, try the matter *de novo*, and determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one (*State v. Chicago*, 38 Minn. 281, 298.) And the performance of such duties cannot, under our constitution, be imposed on the judiciary. (*Foreman v. Board*, 64 Minn. 371; *State v. Young*, 29 Minn. 474; *Reagan v. Farmers, etc., Co.*, 154 U. S. 362.)
> * * *

"The district court can review the findings of the commission only so far as to determine whether or not the rates fixed are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand. * * *

"Of course, in determining whether the rates fixed are confiscatory, the court must incidentally consider what are reasonable rates, but it must also resolve every reasonable doubt on that question in favor of the findings of the commission."

See also:

Minneapolis St. P. & S. Ste. M. R. Co. v. R. R. Comm., 136 Wis. 146.

Chicago, Rock Island & P. R. Co. v. Railway Commission, 85 Neb. 818, 824-5.

Spring Valley Water Works v. San Francisco, 82 Cal. 286, 306.

Jacobson v. Wisconsin Ry. Co., 71 Minn. 513, 529, affirmed in 179 U. S. 287.

Morgan's etc., R. Co. v. R. R. Comm. of Louisiana, 109 La. 247, 265.

In re Amsterdam, 33 N. Y. Supp., 1009.

People v. Board of R. R. Comm., 53 App. Div. (N. Y.) 61.

Pensacola, etc., R. Co. v. State, 25 Fla. 310.

Storrs v. Pensacola Ry. Co., 29 Fla. 617.

State ex rel. R. R. Comm. v. Seaboard Air Line R. Co., 48 Fla. 129.

Doubtless cases may be found where apparently the decision involved a consideration of the "reasonableness" of the rate fixed pursuant to legislative authority. But, as is indicated by the foregoing cases, the word must be taken as meaning "constitutional and such as reasonable men might have found," or else the decisions must fall. This is clearly pointed out by Judge Noyes' work on "American Railroad Rates," p. 212, note.

COURTS WILL PROTECT CONSTITUTIONAL RIGHTS—THEY DO NOT PERFORM ADMINISTRATIVE FUNCTIONS.

Any construction which would permit the courts to review, *de novo,* the facts except within the limitations outlined, would overwhelm the judiciary with administrative work, which it is not the business of courts to perform. The courts would be at the beck and call, not alone of every carrier which desired the reasonableness of a rate reviewed, but also of every one who was dissatisfied with the administrative determination of any other functionary, and these administrative bodies would be an unnecessary expense. Courts are the proper final arbiters as to the protection of constitutional rights and the final interpretation of statutes, but the legislative, the executive, and the administrative departments, within the limits of their constitutional powers, may be safely trusted to exercise a reasoning discretion and perform their functions intelligently, fairly, and with a view to the common good.

> "The notion that Commissions of this kind should be closely restricted by the courts and that justice in our day can be had only in courts

is not conducive to the best results. Justice dwells with us as with the fathers, it is not exclusively the attribute of any office or class, it responds more readily to confidence than to criticism, and there is no reason why the members of the great Railroad Commission of this state should not develop and establish a system of rules and precedents as wise and beneficent within their sphere of action as those established by the early common law judges. We find the statute well framed to bring this about."

Minneapolis, St. P., etc., R. Co. v. R. R. Com. of Wisconsin, 136 Wis. 146, 169.

RULES OF PLEADING APPLIED TO ALLEGATIONS OF BILL.

Having in mind the function and powers of the commission and the order made, and the fact this case stands on the bill and the demurrers thereto, we cite authorities construing effect of allegations and what allegations must be found in a bill of this character.

Complaint must contain full, accurate, clear, certain and positive statement of ultimate facts.

Bates Fed. Eq. Pro. Vol. 1, Sec. 127.

In construing an ambiguous clause the court is bound to adopt that interpretation which is least favorable to plaintiff.

Foster's Fed. Prac., Sec. 106.

A demurrer only admits facts well pleaded; it does not admit matters of inference and argument; it does not admit the accuracy of an alleged construction of an instrument when the instrument itself is before the court, nor the construction of the ascription of a purpose to the parties when not justified by the language used. The averments of the plaintiff as to his understanding of his rights and of the liabilities and duties of others can exert no influence upon the mind of the court in the disposition of the demurrer.

Foster Fed. Prac. Section 106.

Dillon v. Barnard, 21 Wall. 430, 437, 438.

U. S. v. Ames, 99 U. S. 35, 45.

Interstate L. Co. v. Maxwell L. Co., 139 U. S. 569.

Demurrer does not admit facts repugnant to each other or any fact of which the court will take judicial knowledge.

Bates Fed. Eq. Pro. Sec. 209.

A demurrer does not admit conclusions of law.

Foster Fed. Prac. Sec. 106.

Bates, Fed. Eq. Pro., Sec. 209.

Such for example are allegations that a tax is "unreasonable and excessive" without the stating of any valid reasons for it.

Packet Co. v. Catlettsburg, 105 U. S. 559.

A demurrer does not admit a false allegation concerning a fact of which the court will take judicial knowledge. Demurrer does not admit a construction of a statute, nor that a statute confers rights or imposes obligations pleaded.

Bates, Fed. Eq. Pro. Sec. 207.

Facts ill-pleaded, mere conclusions of law, and immaterial matters, are not for any purpose admitted by the demurrer, nor are allegations which are contradicted by annexed exhibits nor matters judicially noticed.

Bryant, Code Pleading, p. 223.

Boone, Code Pleading, (1st Ed.) 118.

Bliss, Code Pleading, 2nd E. 418.

Attorney General v. Foote, 11 Wis. 14.

The court will not hold facts as admitted true by a demurrer which are contradicted by legislative acts which they are bound to notice judicially.

Griffin v. Augusta & K. R. R. Co., 72 Ga.

When a pleading mistates the effect and purport of a statute upon which the party relies, a demurrer to it does not admit the construction of the statute, or that the statute imposes the obligations or confers the rights which the party alleges.

Pennie v. Reis, 132 U. S. 464, 470.

Woodruff v. New York & C. R. Co., 30 Conn. 63, 90.

Norman v. Kentucky Board of Managers, 98 Ky. 537, 547.

Alexander v. School District, 62 Vt. 278, 277.

Woodstock v. Hancock, 62 Vt. 348, 351.

McPhail v. People, 160 Ill. 77.

An allegation that rate is unreasonable and if enforced will result in large loss of revenue is not admitted by demurrer.

Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 401.

Central of Ga. Ry. Co. v. McLendon, 157 Fed. 961, 977.

B. C. R. & N. Ry. Co. v. Dey, 82 Iowa 312, 343.

Missouri Pac. R. Co. v. Smith, 60 Ark. 221.

ALLEGATIONS IN THE BILL OF COMPLAINT AS TO THE CHARACTER AND EFFECT OF THE RATES FIXED BY THE ORDER AS TO THEIR BEING UNREASONABLE.

The bill of complaint must be treated as an entirety. The order of the commission, the law, the tariffs are all made part of the bill.

By the order it appears after due hearing and investigation certain existing rates were condemned as unjust and unreasonable and the rates named in the order, fixed and determined to be just and reasonable. Moreover it appears that the entire schedule of rates were not under investigation or affected, but commodities moving under class rates only between Portland and points east of The Dalles and Huntington.

Under the allegations of the complaint as to the percentage all their local traffic in the state of Oregon bears to their total traffic the effect of the reduction in revenue which was about 14 per cent, as appears from the order, could not be very serious.

In view of the fact that doubtful or obscure pleading is not favored and that all the facts respecting the probable effect of the rates were within the knowledge of appellant, it must follow that as confiscation was not alleged it could not be and the only question presented or attempted to be presented was the mere reasonableness of the rates as a traffic proposition. This fact the commission was required to and did pass on. There is no allegation or claim that any unjust discrimination will result. The nearest approach to this is the allegation respecting the possible effect the order may have in the trading territory between two cities.

THE ALLEGATION.

There are statements in various paragraphs in the bill alleging the rates in force are "reasonable rates." In paragraph XX (Rec. 14) it is alleged:

> "The rates attempted to be established by the said order, Exhibit I, are lower than the rates fixed and established by said Tariff No. L-525 and are 'unreasonably low and unjust' to your orator. While the immediate effect of such order, Exhibit I, if it should be confined strictly to the state of Oregon, might leave your orator a fair income upon its entire business, nevertheless if the rates attempted to be established by the said order, Exhibit I,

be applied to the interstate business directly affected thereby and if the percentage or reduction effected by such order be applied to the local business of your orator in the states of Oregon, Washington and Idaho, which local business is now being transacted upon rates higher than those fixed by Tariff L-525, it would operate to confiscate the property of your orator and deprive it of property without due process of law, in violation of the constitution of the United States, because such reductions would leave your orator without any fair net earnings upon its property."

In paragraph XXV (Rec. 19) is an allegation that the effect of the order will be to make

"the rates east of The Dalles unreasonably low and unjust to your orator and has the effect of making the rates to some of the points and places east of The Dalles less than the rate to The Dalles. * * * The application of the present rates between Portland and The Dalles to points beyond The Dalles, causes such rates to points beyond The Dalles to be unreasonably low and unjust to your orator."

It is also alleged in the same paragraph that rates upon branch lines shall be the same for equal distances as are undertaken to be fixed and established upon the main line; that the cost of the service is much greater upon branch lines than upon the main line and the traffic less and the service rendered the public reasonably worth more upon such branch lines than the service rendered for corresponding distances upon the main line and that the rate so undertaken to be fixed and established upon such branch lines by said order Exhibit I, are unreasonably low and are unjust to your orator."

It is alleged that between Portland and La Grande and Portland and Baker City, the distance being respectively 305 miles and 356 miles, the order allowed but a slight difference in some classes and none in others, in the rate between Portland and these two places, and in this connection the complaint alleges:

> "It is a fact and your orator so charges that such attempted adjustment of rates is arbitrary and unreasonable and is founded upon no circumstance and condition affecting the cost of service to your orator, or the value of the service to the public and is unjust to your orator * * * and avers * * * that the entire basis of rates and the rates so undertaken to be fixed and established by said railroad commission in and by said order, Exhibit I, are arbitrary and are unreasonably low and unjust to your orator and because thereof said order should be set aside for the reason that the said commission has no power to attempt to establish arbitrary, unjust and unreasonable rates upon the lines of your orator of said railroad and the branches thereof owned or operated by your orator."

We have endeavored to set out all the allegations of the bill as to the character of the rates fixed by the order in question, in order that the Court might have before it in succinct form the allegations respecting this phase of the case and to which the demurrer was directed. It is not uncommon in complaints of this character to indulge in loose generalization and conclusions of the pleader and to refer to orders of commissions or acts of the legislature as being "unreasonable and unjust," "arbitrary," "capricious," "confiscatory *pro tanto*" and

the like, and adjectives are used rather indiscriminately in seeking to characterize the order and action of a Commission in reducing rates or condemning an unjust discrimination. The bill of complaint in this cause is no exception to the rule. Such allegations, however, are not allegations of fact—and facts must be stated to enable a complainant to relief.

FACTS NOT PLEADED.

It will be observed the complaint states no ultimate facts, and the omissions of statement of fact are of peculiar pertinency. There is no allegation as to the value of the property devoted to the public use, the capitalization, the receipts or disbursements, the dividends paid or not paid, the net earnings, the probable loss under the order, the amount of traffic affected by the order, the amounts received from state and interstate business, the relative freight and passenger earnings—absolutely not one of the many salient facts, which under all the rules of pleading must be alleged to place a court in a position to act intelligently or an adversary to frame an issue. No allegation, even in general terms, squints at confiscation or even that the order as made will seriously impair the revenue.

Indeed a reduction in rates does not necessarily decrease earnings.

Willcox v. Cons. Gas Co., 212 U. S. 19, 51.

Knoxville v. Knoxville Water Co., 212 U. S. 1, 18.

Chic. & G. T. R. Co. v. Wellman, 143 U. S. 339.

The absence of the necessary allegations of fact and the evident theory on which the bill was framed was referred to in the opinion of the Court below as follows (Rec. 75):

> "This brings us to the ultimate question whether, under the allegations of the bill, it appears that the rates imposed by the Railroad Commission are unreasonable and unjust to the complainant company. There is a statement in paragraph 20 of the bill which is very significant." (The court then quotes the allegation of paragraph XX as set out at page 12 *ante*).
>
> "This signalizes the particular theory upon which this suit is instituted. But the order has or can have no effect beyond the limits of the state of Oregon. It was not so designed, nor is such its operative force, except as it may affect interstate commerce incidentally merely. It is no purpose of the railroad commission act, nor of the order of the commission, that the rate fixed by the commission should be applied to interstate business, or any part or parcel thereof, nor the business of complainant in Washington or Idaho, or elsewhere than in Oregon. That it may operate to affect incidentally interstate rates established, or the rates on complainant's lines in Washington and Idaho, is, as I have endeavored to show heretofore, not to the purpose. The question is: Are the rates established by the commission in Oregon, and for Oregon, and not beyond its confines, reasonable? That they are, is practically admitted by the averment quoted, that the effect of the order, if confined to the state, might leave a fair income upon complainant's entire business. In other words, the pleader is

> not willing to negative the fact of reasonableness that attends the order by legal presumption. Tested by the demurrer, the averment is to be construed most strongly against the pleader."

In *B. C. R. & N. Ry. Co. v. Dey*, 82 Iowa 312, much more direct allegations were made respecting the unremunerative character of the rates and the effect of the order than in the case at bar.

Discussing these allegations and their effect, at page 343 the court says:

> "What is averred here as to the deprivation of property, and the future operations of the road at a loss, are mere conclusions as to supposed effects. It does not amount to an allegation of facts. It is the mere statement of a conclusion that the road would be operated at a loss because plaintiff would be compelled by the statute to enter into involuntary unreasonable and unprofitable contracts. The allegation in question is, indeed, a conclusion based upon another conclusion as to the supposed operations of the statute."

It will be noted it is not alleged in the bill involved herein that the effect of the changes made, even including its alleged application to interstate business, would be confiscatory, but the hypothesis is indulged in that *if* the reduction be applied to interstate business, and *if* the percentage of reduction be applied to local business in three state then confiscation would result "because such reductions would leave your orator without *any fair net earnings upon its property.*"

Under this purely imaginary state of facts appellant cannot and does not allege confiscation except as quali-

fied, and that qualification purely its opinion, without the slightest guide being given as to what in its judgment constitutes fair net earnings or what the value of the property is upon which in its opinion the fair net earnings should be based.

It is perfectly manifest that the order will not work irreparable injury, that no great loss will result thereunder, but appellant is endeavoring to invoke the jurisdiction of the court to pass merely upon a traffic question as to whether the rates fixed were reasonable in the ordinary sense of the word.

RATES EAST OF THE DALLES, LA GRANDE, BAKER BRANCH LINES.

The allegations wherein it is alleged rates to The Dalles from Portland are unreasonably low and that rates east of The Dalles, being based on the rates to The Dalles, make rates to points east of The Dalles unreasonably low and unjust are purely argumentative and set forth no facts from which it might be decreed that the rates fixed by the Commission were even unremunerative to the company.

The same criticism applies to the allegations respecting the rates on branch lines and rates between Portland and La Grande and Baker City. In the case of *Receivers & Shippers' Association v. C. N. O. & T. P. Ry. Co.*, 18 I. C. C. Rep. 440, 465, the commission says: "Commission rates are usually the same for all lines, both main line and branches."

We also refer to the allegation that the effect of the order will be to make the rates to some of the points and

places east of The Dalles less than the rate to The Dalles. As the order and tariff L-525 are both made part of the complaint, an examination of these shows how difficult it was to frame a complaint that would give any court jurisdiction on the facts.

It will be observed the reduction is based on a percentage reduction based on rate to The Dalles, which was unchanged. This necessarily would make for a trifling distance lower rates east of The Dalles than at The Dalles unless otherwise cared for, but this very situation is provided against in the order, which, as to this point reads as follows:

> "Provided the rates herein ordered may *equal* the present rates between Portland and The Dalles, where the application of the formula herein prescribed would *reduce* the rates below the said present rates between Portland and The Dalles."

Thus this fact as alleged in the complaint is negatived by the order itself.

Moreover the distance where the rates remain the same as The Dalles, as shown by the tariff L-525, is nominal, not exceeding ten or fifteen miles, and if the court knows or can take judicial knowledge of the physical characteristics of the particular section of country covered by this mileage, it could draw a fair inference as to the extremely limited amount of traffic affected.

PERCENTAGE REDUCTION.

As the order was a percentage reduction applying to all class rates and was based on the rates published in tariff L-525, the rates under which are alleged by ap-

pellant to be "reasonable and just," the so called arbitrary action of the commission had, if nothing else, the precedent set for years by the appellant in its "just and reasonable" basis of rates as set out in the tariff.

It appears from tariff there are but six branch lines of short mileage and rates thereon were generally the same as on the main line for like distances. The basis of the rates betwen Portland and La Grande and Baker City was also voluntarily established by appellant.

It would appear therefore the commission was endeavoring to follow, where it was proper, the general relation of local rates established through a series of years by the appellant itself.

Without inquiring or having the right to inquire into the reasons by which the commission arrived at their conclusions, it is sufficient to say the reduction ordered applied proportionately to all classes and to all points alike east of The Dalles and on its face was and is just, equitable and reasonable.

COMMISSION PRESUMED TO HAVE ACTED LAWFULLY.

Moreover it will be presumed the Commission acted lawfully and took into consideration all the proper facts and circumstances in arriving at its conclusion—a right it had, and its duty under the law. The difficulty an administrative body often meets with, is criticism, no matter which course it takes. If a reduction is found proper and it is based on a long continued commercial condition generally created or recognized by the carrier, it is arbitrary; if a change is made, it is revoluntionary.

Issues such as are sought to be tendered in this case have from time to time received the consideration of the courts.

Under Section 81 of the Oregon Act (Rec. 133), it is provided "All rates * * * fixed by the commission shall be in force and shall be prima facie lawful," etc.

Under a clause substantially similar to this, in the case of *Atlantic Coast Line v. Florida*, 203 U. S. 256, the Supreme Court upheld a similar provision of the law, and in discussing the question, said: "We start, therefore, with the presumption in favor of the order."

The averments of the bill cannot override the formal decision of the commission on a question of fact. The decision of the commission is entitled to respect and consideration, and, to say the least, its findings and decisions on questions of fact should be treated as *prima facie* correct.

> *Cumberland, etc., Co. v. Railroad Commission*, 156 Fed. 834, 837.

Arbitrariness of action on the part of a commission is not ground for judicial interference with its action, when such action does not appear to be arbitrary except in the sense in which many honest and sensible judgments are so.

> "They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth. The board was created for the purpose of using its judgment and its knowledge. (Citing *Railroad Tax Cases*, 92 U. S. 575; *State v. Savage*, 65 Neb. 714, 768, 769; *Re Cruger*, 84 N. Y. 619, 621; *San Jose Gas Co. v. January*, 57 Cal. 614, 616). Within

its jurisdiction, except, as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end."

Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 598.

We submit the allegations as pleaded under the authorities are simply conclusions of the pleader, many of them based on hypothetical conditions, and that there is nothing therein set out which would enable the court to say the rates fixed by the commission are unreasonably low, and therefore they do not state a cause of suit.

THE COMMISSION DID NOT PASS UPON THE ENTIRE SCHEDULE OF RATES NOR FIX RATES COVERING THE ENTIRE SCHEDULE.

In view of the fact that the interposition of a court in cases of this character is based largely upon the confiscatory character of an order, it should be borne in mind the order in question deals with class rates and on movements of intrastate freight under these rates from Portland and other points on the appellant's lines of railway in Oregon, east of The Dalles only. No changes were made in the distance tariffs or in commodity, or special commodity rates of any kind. The bill of complaint itself shows the limited application of the

order, and the effect on revenue was relatively so slight appellant did not even hazard a statement in the bill as to the amount.

In view of the rulings of the courts as to the difference where a rate or a group of rates are affected as compared with changing an entire schedule, these facts are of importance.

CONFISCATION CANNOT BE PREDICATED OF A SINGLE RATE OR GROUP OF RATES, BUT MUST BE JUDGED FROM THE EFFECT ON THE ENTIRE BUSINESS DONE WITHIN THE STATE.

The *pro tanto* confiscation theory has not received judicial approval. This is so, because such a theory would result in compelling a commission, before it could make or enforce an order, to determine accurately the exact cost of carrying each particular commodity and the exact return thereon, with the unsound implication that every rate must bear its fixed percentage of cost and pay a given profit.

The doctrine has received the highest judicial approval.

Willcox v. Consol. Gas. Co., 212 U. S. 19.

Atlantic Coast Line v. North Carolina Corp. Comm., 206 U. S. 1.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257.

St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 665.

Southern Ry. Co. v. Atlanta Stove Co., 128 Ga. 207, 288, 284.

Wisconsin, etc., R. Co. v. Jacobson, 71 Minn. 519, s. c. 179 U. S. 287, 302.

State v. Missouri Pac. R. Co., 76 Kans. 407.

Pensacola, etc., R. Co. v. Florida, 25 Fla. 310.

Morgan's R. R. Co. v. R. R. Comm., 109 La. 247.

People v. Railroad Co., 176 Ill. 512.

Chicago & Union Traction Co. v. Chicago, 199 Ill. 579.

In this connection it must be borne in mind that the Supreme Court of the United States, in deciding whether the rates fixed under the legislative authority violated the fourteenth amendment, do not rest their judgment on one set of rates for specific articles, but they take into consideration all the rates on all articles, and decide whether, as a whole, the result is unreasonable.

Smyth v. Ames, 171 U. S. 361.

In the case of the *Southern Ry. Co. v. Atlanta Stove Co., supra*, it was averred that the rates prescribed were unreasonable; that the amount earned in the transportation of the articles covered by the circular, between the points therein prescribed, would be less than the cost of service, and the effect of the enforcement of the rate would be to take property without due process of law, denying complainant the equal right and protection of the law, contrary to Section 1, Article XIV, of the amendments to the Constitution of the United States.

The court upheld the order of the Commission, citing the case of *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, and also *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, and said amongst other things:

> "The commission fixes a schedule of rates, some commodity rates which are higher than others, and necessarily so. The entire body of rates are prescribed with respect to their interrelation. The low rate is presumably fixed with reference to the higher rate, and conversely; and a particular rate cannot be said to be unreasonable without showing it to be such when taken in connection with the whole body of rates."

They then held that the averment above set out, stating that the rates between the points therein prescribed would be less than the cost of service, did not raise an issue of fact,

> "since conceding the truth of the averment for the reasons given above, the rate therein prescribed is not alleged to be unreasonable as a part of the whole body of rates prescribed by the commission."
>
> "What the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. * * * It can not, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public."
>
> *Reagan v. Farmers L. & T. Co.*, 154 U. S. 412.
>
> *Smyth v. Ames*, 169 U. S. 466, 544, 547.

San Diego Land Co. v. National City, 174 U. S. 739.

A corporation is not entitled as of right and without reference to the interests of the public to realize a given per cent upon its capital stock. Stockholders are not the only persons whose rights are to be considered. The rights of the public are not to be ignored. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.

Covington & Lex. Turnpike R. Co. v. Sandford, 164 U. S. 578, 596, 597.

Jerome Hill Cotton Co. v. M., K. & T. Ry. Co., 6 I. C. C. Rep. 601.

Southern Pac. Co. v. Bartine, 170 Fed. 725.

In *Covington & L. Turnpike R. Co. v. Sandford supra*, the Court *inter alia* said:

> "We could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the Legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only

persons whose rights or interests are to be considered. The rights of the public are not to be ignored. * * * In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the Legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law."

MANY ELEMENTS ARE TO BE TAKEN INTO ACCOUNT IN DETERMINING THE REASONABLENESS OF A RATE.

Interstate Com. Com. v. Chic. G. W. Ry. Co., 141 Fed. Rep. 1008, 1015.

Beale & Wyman R. R. Rate Reg., Chap. XI, Sec. 814.

Imperial Coal Co. v. P. & L. E. R. R. Co., 2 I. C. C. Rep. 618.

New Orleans Cotton Exchange v. I. C. R. R. Co., 3 id., 584.

Thompson Lumber Co. v. I. C. R. R. Co., 18 id., 657.

The Interstate Commerce Commission has had occasion in a number of instances to comment upon the varying conditions that must be considered in fixing just and reasonable rates. As illustrative, we cite the following:

Imperial Coal Co. v. P. & L. E. R. R. Co., 1 I. C. C. Rep. 618.

New Orleans Cotton Exch. v. I. C. R. R. Co. et al., 3 I. C. C. Rep. 584.

Dallas Freight Bureau v. G. C. & S. F. Ry. Co. et al., 12 I. C. C. Rep. 228.

In *Noyes Amer. R. R. Rates* at page 25, the author says:

> "But all this (the fair return on the value of the property devoted to the public use) has very little to do with particular charges. The value of the railroad property is only important in determining the reasonableness of an entire schedule of rates, an inquiry which can hardly arise except when a law-made tariff is attacked as being confiscatory and, therefore, unconstitutional. The value of the property is a most remote consideration in fixing an individual rate. While each shipment should undoubtedly produce its X-millionth part of the revenue required from all shipments, X is an unknowable quantity. It would be impossible to fix even the maximum of individual rates in any such way. In the long run the schedule should bring in a fair return upon capital invested, but the necessity for such return has

practically no effect upon the charge for the particular service. We must look for other factors to determine the individual charge."

FAIR RETURN ON REASONABLE VALUE.

Subject to many qualifications it may be said generally that a fair return should be allowed upon the reasonable value of the property at the time it is being used by the public.

However, the pleadings in this case do not raise this issue. There is not one fact alleged which shows or tends to show the value or even the capitalisation of the appellant, not a statement exhibited or figure given. The net returns it is now receiving are not even referred to nor how the net returns will be affected by the order. For aught the court knows under the order appellant's net returns on the value of the property devoted to the public use may be very great.

It is unnecessary to discuss a question not in the case.

It is respectfully submitted the judgment and decree of the court below should be affirmed.

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APPENDIX A.

CHAPTER 103.

AN ACT.

To amend Section 33 of Chapter 53 of the General Session Laws of the state of Oregon for the year 1907.

Section 1. That Section 33 of Chapter 53 of the General Session Laws of the state of Oregon for the year 1907 be and the same hereby is amended to read as follows: Section 33. After the commencement of such suit the Circuit Court may for cause shown, upon application to the Circuit Court or presiding judge thereof, and upon notice to the commission and hearing, suspend or stay the operation of the order of the commission complained of until the final disposition of such suit, upon the giving of such bond or other security, and upon such conditions as the court may require; and if such order of injunction suspends the order or requirement of the commission fixing rates, then the court shall require a bond with a good and sufficient surety, conditioned that the railroad or railroads applying for such injunction shall answer for all damages caused by the delay in the enforcement of the order of the commission and all compensation for whatever sums for transportation any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the commission had not been suspended; and such bond shall cover the periods transpiring from time of the issuance of any such injunction until the final determination of the question litigated. The said bond shall be executed in favor of the Railroad Commission of Oregon for the benefit

of whom it may concern, and shall be enforceable by said commission or any person interested, in an appropriate proceeding. Any person paying charges found to be excessive, shall have a claim for the excess whether paid under protest or not, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such railroad, or such railroad and the sureties on such bond. Claims of persons for money collected in excess of the amount payable under the rate or rates established by the commission shall be assignable in the same manner as any chose in action. No appeal to the Supreme Court shall stay the operation of any order of the commission unless the Circuit or Supreme Court shall so direct, and unless the railroad so appealing shall give a bond with like conditions and terms as that given on granting injunctions suspending an order of the commission fixing rates.

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